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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MARYLAND,

Petitioner,

v.

ANTHONY GRANDISON, SR.,

Respondent.

Petition For A Writ of Certiorari To The Circuit Court for Somerset County, Maryland

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do rules intended merely to facilitate a capital sentencing jury's consideration of mitigating factors fall within the narrow "watershed rules of criminal procedure" exception to the *Teague v. Lane* non-retroactivity doctrine?

PARTIES

The caption contains the names of all parties below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MARYLAND,

Petitioner,

v.

ANTHONY GRANDISON, SR.,

Respondent.

Petition For A Writ of Certiorari To The Circuit Court for Somerset County, Maryland

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Circuit Court for Somerset County, Maryland.

OPINIONS BELOW

The Opinion and Order of the Circuit Court for Somerset County, Maryland, vacating the sentence of death against Respondent, Anthony Grandison, Sr., is reproduced in Appendix A. (1a-44a).

The Order of the Court of Appeals of Maryland denying discretionary review of the circuit court's Opinion and Order is reproduced in Appendix B. (45a).

STATEMENT OF JURISDICTION

On October 23, 1992, the Court of Appeals of Maryland issued its Order denying discretionary review in this case. This petition is filed within ninety days after the date of that Order. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a). *See* Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

In the early spring of 1983, Respondent Grandison was incarcerated awaiting trial on federal narcotics charges in the United States District Court for the District of Maryland. Two of the witnesses scheduled to testify for the Government at the federal trial were David Scott Piechowicz and his wife, Cheryl, who were employees of the Warren House Motel, where Grandison had briefly resided or visited prior to his incarceration. To prevent the Piechowiczes from testifying, Grandison hired Vernon Evans, Jr. to kill them. On April 28, 1983, Evans entered the motel carrying a MAC-11 machine pistol, and shot and killed Mr. Piechowicz and a woman, Susan Kennedy. Evans was not familiar with the Piechowiczes, and was unaware that Cheryl Piechowicz had arranged on the morning of April 28 for her sister, Ms. Kennedy, to work in her place at the motel that day.

On June 30, 1983, the State of Maryland charged Grandison with the murders of Mr. Piechowicz and Ms. Kennedy, and subsequently notified him of its intention to seek the death penalty on those charges. (1a). Additionally, the United States had charged Grandison with federal witness tampering and criminally violating the federal civil rights of Mr. Piechowicz. (1a-2a). While the State murder charges were pending trial, Grandison was convicted in federal court on the original narcotics charges and the subsequent witness-related charges. (1a-2a).[1]

On February 3, 1984, Grandison appeared in the Circuit Court for Somerset County, Maryland, where he was convicted on the murder counts and other lesser charges. (2a).[2] The court imposed prison terms on the lesser charges, and at the subsequent capital sentencing proceeding the jury returned separate sentences of death on the two murder counts. (2a). The Court of Appeals of Maryland affirmed Grandison's convictions and sentences. *Grandison v. State*, 305 Md. 685, 773, 506 A.2d 580, 624 (1986). The judgments became "final" for purposes of direct review

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[1] Grandison's federal convictions were subsequently affirmed on appeal. *See United States v. Grandison*, 783 F.2d 1152, 1155-57 (4th Cir.), *cert. denied*, 479 U.S. 845 (1986) (affirming convictions on federal narcotics charges); *United States v. Grandison*, 780 F.2d 425, 428-29 (4th Cir. 1984), *vacated and remanded*, 479 U.S. 1076 (1987), *reinstating prior affirmance on remand*, 885 F.2d 143 (4th Cir. 1989) (affirming convictions on federal witness-related charges).

[2] Grandison was originally indicted in the Circuit Court for Baltimore County, Maryland, the county where the murders occurred; however, Grandison subsequently exercised his right under Maryland law to automatic removal and the case was transferred to Somerset County. (1a-2a).

on October 6, 1986, the date on which this Court denied certiorari. *Grandison v. Maryland*, 479 U.S. 873 (1986) (order).

Grandison petitioned the United States District Court for the District of Maryland for federal habeas corpus relief in May 1987. (2a-3a). On July 27, 1988, the district court dismissed the petition for failure to exhaust state remedies. (3a). Grandison appealed and, on January 12, 1990, the United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling. (3a).

While Grandison's habeas corpus petition was pending before the federal district court, this Court decided *Mills v. Maryland*, 486 U.S. 367 (1988). The Court held the Maryland capital sentencing form and jury instructions unconstitutional because the jurors in *Mills* could have concluded that they were precluded from giving any weight in the final balancing of aggravating and mitigating factors to those mitigating factors found by some, but not all, jurors. *Id.* at 373-84. The sentence of death in that case was therefore vacated. *Id.* at 384.

On November 1, 1990, Grandison filed a petition for state post conviction relief. On January 28, 1991, the post conviction court conducted an evidentiary hearing on the petition and, on December 6, 1991, the court conducted an additional hearing to consider three new claims that Grandison advanced at the first hearing. (3a-5a). Among the claims considered was Grandison's assertion that *Mills* error necessitated reversal of his death sentences. (12a-17a).

On July 31, 1992, the post conviction court issued its decision. The circuit court granted relief on Gran-

dison's claim that the written capital sentencing form and instructions were indistinguishable from those held unconstitutional in *Mills* and that he was entitled to retroactive application of that decision.[3] The circuit court found that *Mills* applied to Grandison's case under the second exception to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), concerning "bedrock procedural elements essential to the fairness of a proceeding." (14a-16a). As to Grandison's remaining post conviction claims, the circuit court denied relief. (5a-12a, 17a-43a).

The State timely applied to the Court of Appeals of Maryland for leave to appeal from the circuit court's grant of post conviction relief as to the death sentences. *See* Md. Ann. Code, Art. 27, § 645-I (1957, 1992 Repl. Vol.); Md. Rule 8-306(e). Grandison filed a cross-application seeking review of the circuit court's denial of post conviction relief as to the underlying convictions. On October 23, 1992, the Court of Appeals denied the State's application and Grandison's cross-application. (45a).

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[3] The circuit court found that the retroactivity issue was controlled by this Court's retroactivity analysis in *Teague v. Lane*, 489 U.S. 288 (1989). (9a-10a, 13a-14a). This holding is consonant with pre-*Teague* decisions of the Court of Appeals of Maryland indicating that this Court's decisions form the sole constitutional retroactivity analysis applicable in Maryland post conviction proceedings. *See, e.g., State v. Colvin*, 314 Md. 1, 25, 548 A.2d 506, 517-18 (1988) (applying *Linkletter v. Walker*, 381 U.S. 618 (1965), to determine retroactivity of *Mills*).

REASONS FOR GRANTING THE WRIT

RULES INTENDED MERELY TO FACILITATE A CAPITAL SENTENCING JURY'S CONSIDERATION OF MITIGATING FACTORS DO NOT FALL WITHIN THE NARROW "WATERSHED RULES OF CRIMINAL PROCEDURE" EXCEPTION TO THE *TEAGUE v. LANE* NON-RETROACTIVITY DOCTRINE.

Teague v. Lane, 489 U.S. 288 (1989), represents a major reform in the criminal law, restoring a sense of balance and fairness in the treatment of retroactivity of new constitutional rules of criminal procedure. The ultimate success of *Teague*, however, in enforcing greater respect for finality of convictions depends on the proper interpretation and application of that decision.

As explained below, the second of the two *Teague* exceptions threatens to swallow the *Teague* presumption of non-retroactive application of new rules to cases having "final" convictions. This exception, involving "watershed rules of criminal procedure," by this Court's own account has never been clearly defined. Virtually all federal circuits have had an opportunity to discuss the exception, but confusion and conflict have resulted, especially as to one of its prongs. That confusion has carried over directly to the present case, resulting in a decision which is at odds with the narrow applicability that this Court has indicated it intended for the second exception.

A. This Court's decisions provide only limited guidance concerning the proper boundaries of the *Teague* exception for "watershed rules of criminal procedure."

With one glaring "exception," this Court has confronted many of the thorny problems generated by

the *Teague* non-retroactivity doctrine. The threshold issue of whether a constitutional rule of criminal procedure is "new," and thus not available to those defendants whose convictions are final, has been examined at length not only in *Teague*, 489 U.S. at 299-301, but also in each of the Court's post-*Teague* cases.[4] Similarly, the first exception to non-retroactivity, concerning rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *id.* at 311, not only has been discussed since *Teague*, but also has been found satisfied in an Eighth Amendment context, *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989).

The second *Teague* exception, in contrast, remains largely undefined in this Court's decisions. Under this exception, retroactive application is justified with respect to those "watershed rules of criminal procedure" that not only are "aimed at improving the accuracy of the trial," but also "alter our understanding of the *bedrock procedural elements*" essential to the fairness of the proceeding. *Teague*, 489 U.S. at 311. Thus, the exception has two prongs—an "accuracy" prong and a "bedrock procedural elements" or "essential to fairness" prong—both of which must be satisfied in order for the exception to apply. *Id.* at 312. Recognizing that the meaning of the "bedrock procedural elements" prong was not necessarily self-

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[4] *See Stringer v. Black*, 112 S. Ct. 1130, 1135-40 (1992); *Sawyer v. Smith*, 110 S. Ct. 2822, 2826-31 (1990); *Saffle v. Parks*, 494 U.S. 484, 488-95 (1990); *Butler v. McKellar*, 494 U.S. 407, 412-16 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 313-30 (1989).

evident, the *Teague* plurality[5] cautioned that few "such components of basic due process have yet to emerge." *Id.* at 313. Such components are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal means." *Id.* Elsewhere in the *Teague* opinion, the plurality offered a watershed rule of a different type, and of much more recent vintage: the right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Teague*, 489 U.S. at 311-13.

Despite *Teague*'s narrowing illustrations, the precise meaning of "bedrock procedural elements" remains uncertain. Indeed, the Court in *Saffle v. Parks*, 494 U.S. 484, 495 (1990), recognized that "the precise contours" of the prong are "difficult to discern." Given the Court's own difficulty in defining the prong, it is hardly surprising that the lower courts have been equally confounded in their attempts to apply the doctrine.

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[5] The plurality joining in the *Teague* non-retroactivity discussion became a majority in *Penry*, 492 U.S. at 307, 313-16, 329-30.

B. The extensive body of federal decisions discussing *Teague* has not clarified the second *Teague* exception but, to the contrary, has generated conflict and confusion concerning the "bedrock procedural elements" prong, especially as it applies in contexts like the present one.

The second *Teague* exception has been discussed or applied by virtually all of the federal circuits.[6] However, this substantial body of precedent has not served to clarify the second exception, but rather has led to conflicting interpretations of the "bedrock procedural elements" prong of this exception. Indeed, the confusion extends to the very issue presented in this case.

A clear and direct link can be drawn between the degree of expressed difficulty with which the federal courts of appeals have applied or rejected the second *Teague* exception and the extent to which this Court's decisions have provided sufficient guidance. On the

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[6] *See, e.g., United States v. Lopez-Pena*, 912 F.2d 1542, 1545 n.3 (1st Cir. 1989), *aff'd on reh'g sub nom. United States v. Martinez-Torres*, 944 F.2d 51 (1st Cir.) (en banc), *cert. denied*, 111 S. Ct. 2886 (1991); *United States v. Salerno*, 964 F.2d 172, 178-79 (2d Cir. 1992); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306 & n.19, 317 & n.3 (3d Cir.), *cert. denied*, 112 S. Ct. 280 (1991) (majority and dissenting opinions); *Evans v. Muncy*, 916 F.2d 163, 165-66 (4th Cir. 1990); *Skelton v. Whitley*, 950 F.2d 1037, 1043-46 (5th Cir. 1992); *Cain v. Redman*, 947 F.2d 817, 821-22 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1299 (1992); *Williams v. Chrans*, 945 F.2d 926, 943-46 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3002 (1992); *Wickham v. Dowd*, 914 F.2d 1111, 1115-16 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2897 (1991); *Barker v. Estelle*, 913 F.2d 1433, 1441-43 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2060 (1991); *Andrews v. Deland*, 943 F.2d 1162, 1187 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992); *Lusk v. Singletary*, 965 F.2d 946, 949-50 (11th Cir. 1992).

one hand, where the second exception was found not to apply because the "accuracy" prong was not satisfied, the courts have indicated relatively little difficulty in reaching that conclusion. *See, e.g., Evans v. Muncy*, 916 F.2d 163, 165-66 (4th Cir. 1990) (vacating stay of execution on ground that proposed new rule that defendant's post-sentencing behavior could provide a basis to set aside death sentence "has nothing to do with" trial accuracy under second *Teague* exception).

On the other hand, where the federal courts have found it necessary to consider the "bedrock procedural elements" prong of the second *Teague* exception, the courts have indicated far greater difficulty in reaching a resolution, even where the result was a finding that the prong was not satisfied. This difficulty is manifested in some cases by labored analysis of what otherwise would appear to be an instance where the prong clearly could not apply. *See, e.g., Williams v. Chrans*, 945 F.2d 926, 943-46 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3002 (1992) (although rejecting "bedrock procedural element" status for *Batson v. Kentucky*, 476 U.S. 79 (1986), seemingly suggesting the issue was a close one, despite this Court's pre-*Teague* holding that *Batson* was not retroactive). Other courts have evidenced their bewilderment by avoiding critical analysis altogether and issuing instead a bare pronouncement that the prong did not apply. *See, e.g., Cain v. Redman*, 947 F.2d 817, 821-22 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1299 (1992); *Andrews v. Deland*, 943 F.2d 1162, 1187 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992). Significantly, in many of these opinions, it is difficult to discern where the discussion of the "accuracy"

prong ends, and where the discussion of the distinct "bedrock procedural elements" prong begins.

The "bedrock procedural elements" prong has generated not only confusion, but also significant conflicts. For example, in characterizing as a "bedrock procedural element" this Court's decision in *Cruz v. New York*, 481 U.S. 186 (1987), concerning the admission into evidence of a non-testifying co-defendant's confession, the Second Circuit has effectively held that *any* new rule that "implicates" one or more of the "fundamental guarantees of life or liberty" necessarily satisfies this prong. *Graham v. Hoke*, 946 F.2d 982, 994 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 890 (1992). As long as the new rule has some accuracy-enhancing effect, it qualifies under the second exception. *See id.* The Second Circuit's view thus comes even closer to adopting the extreme position of simply "importing into a very different context the terms of the debate over incorporation" than did the proposed approach that *Teague* rejected as "unnecessarily anachronistic." *Teague*, 489 U.S. at 312. And, *Graham* clearly conflicts with those decisions holding that the mere fact that a new rule may somehow relate to the defendant's Sixth Amendment confrontation rights does not render that rule a "bedrock procedural element." *See, e.g., Hardy v. Wigginton*, 922 F.2d 294, 301 (6th Cir. 1990) (rejecting retroactivity for defendant's invocation of Sixth Amendment right to in-court confrontation of victim of child sexual abuse).

The decision relied upon by the court in this case, *Williams v. Dixon*, 961 F.2d 448 (4th Cir.), *cert. denied*, 113 S. Ct. 510 (1992), is itself a prime example of the conflict over the "bedrock procedural ele-

ments" prong of the second *Teague* exception. There, the Fourth Circuit held that *Mills* and a subsequent decision, *McKoy v. North Carolina*, 494 U.S. 433 (1990), which together prohibit the states from precluding consideration at a capital sentencing of mitigating factors found by some but not all members of the sentencing jury, satisfied the "bedrock procedural elements" prong of the second *Teague* exception. 961 F.2d at 454-56. This conclusion not only departs from the earlier views of the Fourth Circuit, *see id.* at 453 n.3 (acknowledging contrary result reached in *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2840 (1991)), but also is in direct conflict with other federal courts considering the retroactivity of *Mills*.

One court has interpreted *Teague* as precluding retroactive application of *Mills*. *See Wilcher v. Hargett*, 978 F.2d 872, 877-78 (5th Cir. 1992). Another court has indicated that *Mills* applies retroactively despite *Teague*, without analyzing whether *Mills* created a new rule or fell within any *Teague* exception. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306 & n.19, 317 n.3 (3d Cir.), *cert. denied*, 112 S. Ct. 280 (1991) (majority and dissenting opinions). In short, not only is there confusion generally on the "bedrock procedural elements" prong, but also there is a conflict on the precise issue presented here.

C. This case presents an appropriate opportunity not only to correct a clear error but also to clarify the limited applicability of the second *Teague* exception to new rules of Eighth Amendment procedure.

Williams v. Dixon reached the remarkable conclusion that the *Mills* and *McKoy* "rule striking down an arbitrary unanimity requirement has the same 'pri-

macy and centrality' as *Gideon*." 961 F.2d at 456. The post conviction court here essentially parroted that reasoning. (14a-16a). This case, clearly wrong under *Teague*, presents an ideal vehicle to clarify the narrow scope of the second *Teague* exception.

The purpose of both *Teague* exceptions is to provide for retroactive application of those extremely rare new rules that operate to prevent likely miscarriages of justice that may have occurred in an entire class of cases. *See Sawyer v. Smith*, 110 S. Ct. 2822, 2832-33 (1990) (emphasizing "actual innocence" exception to procedural default doctrine to illustrate "fundamental" nature of "bedrock procedural elements" under *Teague*). As this case demonstrates, the lower courts have extended the second exception to far more rules than those intended to prevent likely miscarriages of justice. This Court should grant review to clarify that few, if any, of this Court's Eighth Amendment decisions since *Gregg v. Georgia*, 428 U.S. 153 (1976), are sufficiently "fundamental" to satisfy the second exception of *Teague*.

CONCLUSION

This case gives the Court the opportunity to provide needed guidance to the lower courts concerning the second exception to non-retroactivity under *Teague*. For the foregoing reasons, the State of Maryland respectfully requests that the Court issue a writ of certiorari and reverse the judgment of the Circuit Court for Somerset County, Maryland.

Respectfully submitted,

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January 15, 1993

APPENDIX

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APPENDIX A:

Unreported ruling of the Circuit Court for Somerset County, Maryland, dated July 31, 1992, in *State of Maryland v. Anthony Grandison, Sr.*, Case No. 4010 ..... 1a

APPENDIX B:

Unreported order of the Court of Appeals of Maryland, *Anthony Grandison v. State of Maryland*, Misc. No. 29, Sept. Term, 1992, dated October 23, 1992 ..... 45a

APPENDIX A

IN THE CIRCUIT COURT FOR SOMERSET COUNTY STATE OF MARYLAND

CASE NO. 4010

STATE OF MARYLAND

v.

ANTHONY GRANDISON, SR.

OPINION AND ORDER OF COURT

HISTORY OF PRIOR PROCEEDINGS

Petitioner was indicted on June 30, 1983 (indictment number 83-CR-2340) and charged with the following offenses: count one charged first degree murder of David Scott Piechowicz, count two charged first degree murder of Susan Carol Kennedy, count three charged conspiracy to commit murder and count four charged the use of a handgun in the commission of a felony or a crime of violence. Prior to the filing of the State charges, a two count indictment was filed in the United States District Court for the District of Maryland, charging Petitioner with witness tampering, 18 U.S.C. section 1512 and civil rights violations based on interference with the right to be witnesses in a judicial proceeding, 18 U.S.C. section 241.

On September 7, 1983, the State's Attorney for Baltimore County filed a Notice of Intention to Seek a Sentence of Death for the first degree murders contained in indictment #83-CR-2340. Following receipt of that notice, Petitioner moved to have the case removed from Baltimore

County. On December 19, 1983, the records were transmitted to the Circuit Court for Somerset County.

Prior to the State proceeding, the Petitioner was tried in the United States District Court on the federal charges and was convicted on November 1, 1983. On December 15, 1983, Petitioner was sentenced for the federal convictions to life imprisonment plus ten years.

On February 3, 1984, Petitioner appeared in Somerset County on the state charges. At that time, Petitioner waived his right to counsel but requested and was granted the assistance of standby counsel. On February 15, 1984, H. Warren Crawford entered his appearance as standby counsel in Petitioner's case. On May 3, 1984, Petitioner was tried by a jury on the state charges, and on May 22, 1984, was found guilty of all four counts charged in the indictment.

On June 6, 1984, the court imposed a sentence of life imprisonment for the conspiracy conviction and twenty years for the handgun violation. Both prison sentences were ordered to run consecutive with each other and consecutive to the sentence imposed by the federal court. Subsequently, the jury returned sentences of death for both murder counts.

Petitioner filed a Notice of Appeal from the state convictions; his case was heard by the Maryland Court of Appeals on November 5, 1985. On April 1, 1986, the Maryland Court of Appeals affirmed the judgment of the Circuit Court for Somerset County. *Grandison v. State,* 305 Md. 685, 506 A.2d 580 (1986). Subsequently, Petitioner filed a petition for writ of *certiorari* with the United States Supreme Court, but *certiorari* was denied on December 1, 1986. *Grandison v. Maryland,* 479 U.S. 873, *reh. denied,* 479 U.S. 1001 (1986).

Petitioner at this point did not file a state post conviction petition but instead filed, in May, 1987, a petition for

a federal writ of *habeas corpus* seeking relief from his state convictions pursuant to 28 U.S.C. section 2254.[1] On July 27, 1988, the United States District Court dismissed the petition without prejudice holding that the Petitioner had not exhausted his state remedies in four of the eight contentions raised in his petition.

On August 11, 1988, Petitioner filed in the United States District Court a Motion for Reconsideration and a Notice of Appeal, which was denied on November 23, 1988. On December 6, 1988, Petitioner filed a motion with the District Court to reconsider its November 23, 1988 decision; the court denied the motion and appeal on December 14, 1988. On December 19, 1988, Petitioner filed a Notice of Appeal with the District Court from the decision of July 27, 1988, and on January 12, 1990, the District Court affirmed that decision holding that Petitioner's case must be dismissed because he had failed to exhaust his state remedies. *Grandison v. Maryland,* No. 89-4004, slip op. (D. Md. filed Jan. 12, 1990).

On November 1, 1990, Petitioner, through his counsel Jerome E. Deise, Jr., Assistant Public Defender, filed a petition for state post conviction relief in the Circuit Court for Somerset County. This petition contained two challenges to the validity of the state convictions. Also on that date, a stay of execution was signed by the court, and a date was set for the post conviction hearing. However, pursuant to a request from the Petitioner that hearing date was continued until January 28, 1991. On January 21, 1991, Howard L. Cardin entered an appearance as counsel for the Petitioner and filed an amended post conviction petition. The amended petition raised ten additional challenges to the validity of Petitioner's conviction.

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[1] All dates concerning Petitioner's proceeding in the United States District Court were taken from Petitioner's briefs filed with that Court and the subsequent unpublished opinion *Grandison v. Maryland,* No. 89-4004 slip op. (D. Md. filed Jan. 12, 1990).

On January 28, 1991, the hearing on the petition for post conviction relief was held. The Circuit Court for Somerset County heard argument on the twelve issues raised in the original and amended petitions. Also at this hearing, Petitioner raised three additional issues which challenged the validity of the state convictions. These issues related to the (1) denial of equal protection of the laws, (2) denial of effective assistance of counsel at trial and appellate level and (3) the trial judge's failure to properly advise Petitioner of his right to a jury sentencing. In order to give Petitioner a fair opportunity to brief and litigate these three additional issues the court set another hearing for May 31, 1991. Petitioner asked for and was granted a continuance of that hearing until December 6, 1991.

The Court on December 6, 1991, heard arguments as to (1) the denial of equal protection and (2) ineffective assistance of counsel. The Petitioner chose to abandon the issue regarding the failure of the trial judge to advise Petitioner of a jury sentencing. The Court also gave the Petitioner and State's Attorney an opportunity to supplement their previous arguments involving *Booth v. Maryland,* 482 U.S. 496 (1987), in light of the Supreme Court's holding in *Payne v. Tennessee,* ___ U.S. ___, 111 S.Ct. 2597 (1991), in which the Court overruled that part of the *Booth* decision that had held "that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." 111 S.Ct. at 2611 n.2.

During this hearing (December 6, 1991) the Court refused to accept a third amended petition which raised thirteen additional challenges to the validity of Petitioner's conviction.[2] The following opinion addresses the twelve is-

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[2] The court denied the third amended petition, because at the hearing on January 28, 1991, the Court specifically asked the Petitioner if there were any other issues that he would like to raise at the second scheduled hearing. Petitioner responded that he only wished to raise three additional issues. (Tr. dated January 26, 1991 pg. 77,78).

sues filed in the original and amended petitions, and the two subsequent issues which were briefed and argued on December 6, 1991.

Petitioner has also raised an additional issue which may relate to his post conviction proceedings; the issue is a "Motion To Correct The Defendant's Judgment of Commitment Record" which Petitioner filed December 3, 1991. This Court will address this additional issue in a separate Opinion and Order of Court.

This Court will address the issues in the order they were raised in the petitioner's post conviction petitions.[3]

I. PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE INTRODUCTION OF A VICTIM IMPACT STATEMENT.

The Petitioner claims that his convictions and sentences are void because the State improperly introduced into evidence at the sentencing phase of trial a victim impact statement. The Petitioner has made the following arguments alleging the improper use of the victim impact statement.

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[3] It should be noted that the first petition filed identified the two issues contained therein as II "A" and "B", rather than listing them numerically. In the Amended Petition, the Petitioner styled his issues as I through XIII when in actuality there were only ten issues raised. Petitioner then filed a second Amended Petition with two additional issues styled as "1." and "2." For purposes of clarity in this opinion the court will address the issues numerically in the order they were presented to the court. Consequently, the court's numbering of the issues will not coincide with the Petitioner's, however, all 14 issues contained in the three petitions filed by Petitioner will be addressed.

A. The introduction of the victim impact statement was improper, because the United States Supreme Court in *Booth v. Maryland,* 482 U.S. 496 (1987), prohibited the use of such statements, and this new rule announced in *Booth* should be applied retroactively to Petitioner's case.

Petitioner's case became final on December 1, 1986 when the United States Supreme Court denied his Petition for Certiorari in *Grandison v. Maryland,* 479 U.S. 873, *reh. denied,* 479 U.S. 1001 (1986). At that time the Maryland Annotated Code, Article 27, section 413(c)(IV) and Article 41, section 4-609(d) allowed the introduction of victim impact evidence in a death penalty case. The United States Supreme Court did not decide *Booth v. Maryland,* 482 U.S. 496 (1987), which prohibited the use of victim impact evidence, until June 15, 1987. Therefore, at the time Petitioner's case became final the introduction of a victim impact statement was proper. Petitioner now argues that the decision in *Booth* should be applied retroactively to his case making the use of the victim impact statement at the sentencing phase of the trial improper. Petitioner is not entitled to the benefit of the *Booth* decision according to the standards for the retroactive application of new rules that were set forth by the United States Supreme Court in *Teague v. Lane,* 489 U.S. 288 (1989), and therefore his claim must be dismissed.

The *Teague* Court established that in general newly declared rules should be applied only to cases pending on direct review, but should not be applied retroactively to cases on collateral review. *Id.* at 304. The *Teague* Court, however, did set forth two exceptions to this general rule. The Court held that if the new rule (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe or (2) the new rule requires the observance of those procedures that are implicated in the concept of ordered lib-

erty" then the new rule should be applied retroactively to cases on collateral review. *Id.* at 307.

The *Teague* Court further established that a new rule is created when it breaks new ground or imposes a new obligation on the state or the Federal Government, or the resulting rule was not dictated by precedent existing at the time the conviction became final. *Teague,* 489 U.S. at 301. The United States Supreme Court extended the new rule standard of *Teague* to capital sentencing proceedings in *Penry v. Lynaugh,* 492 U.S. 302 (1989). Since Petitioner's post conviction petition involves collateral review, the necessary analysis to determine the retroactive application of *Booth* is whether the decision constitutes a new rule under *Teague,* and if so, whether it falls within one of the *Teague* exceptions.

The decision in *Booth* prohibiting the use of victim impact statements is a new rule under the *Teague* standard because it imposes upon the state a new obligation which was not dictated by precedent. Therefore, the only way *Booth* can be applied retroactively to Petitioner's case is if it falls within one of the *Teague* exceptions.

The Court in *Penry* interpreted *Teague*'s first exception as applying to new rules that placed a certain class of people beyond the state's power to impose a certain penalty.[4] *Penry,* 492 U.S. 302 (1989). The *Booth* decision clearly does not place a class of people beyond the power of the

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[4] The *Penry* Court stated that since Penry was before them on collateral review the Court had to decide if the relief he sought would create a new rule under *Teague.* The Court applied the new rule analysis of *Teague* and explained that if it decided that the Eighth Amendment prohibited the State from imposing the death penalty on mentally retarded persons, such as Penry, the Court would be announcing a new rule that would come under the first exception announced in *Teague,* and therefore Penry would be entitled to retrospective relief of the new rule. *Penry,* 492 U.S. 302 (1989).

State to impose the penalty of death. Therefore, this exception is not applicable to Petitioner's case.

As to the second exception, the *Teague* Court determined that it applies to watershed rules of criminal procedure; rules which are "bedrock procedural elements". *Teague*, 489 U.S. at 315. The United States Supreme Court, in *Saffle v. Parks*, 494 U.S. 484 (1990), and *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822 (1990), also interpreted the second exception in *Teague* as applying to fundamental rights such as the right of the criminal defendant to be represented by counsel. Therefore, in order for the victim impact statement to fall within the second exception the use of the statement would have to be so contrary to the concept of ordered liberty that it would prevent an accurate proceeding or deny Petitioner a fundamental right.

Evidence that the victim impact statement in Petitioner's case does not satisfy the second exception is found in *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991). The Court in *Payne* held that evidence about the victim and the impact of the victim's murder on the victim's family is relevant evidence and "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in by reminding the sentencer that just as the murderer should be considered as an individual so too the victim." 111 S.Ct. at 2608-09. Therefore, *Booth* does not fall within *Teague*'s second exception of prohibiting a procedure that is contrary to the concept of order liberty.

More importantly, *Payne* overruled a portion of the *Booth* decision by holding that there is no constitutional bar to the introduction of victim impact evidence or statements which relate to the victim and the impact of the victim's death on the family. The effect of the *Payne* decision is to restore the law set forth in Article 27, section 413(c)(IV) and Article 41, section 4-609(d), which allow the

introduction of victim impact evidence in a death penalty case.

The victim impact evidence introduced in Petitioner's case related directly to the impact the murder had on the victim's family and did not relate to any characterizations or opinions about the crime, therefore, the victim impact evidence was admissible. This Court finds for the above reasons that the decision in *Booth* is not to be applied retroactively to Petitioner's case and the claim must be dismissed.

B. The "new rule" analysis announced in *Teague* is only applicable to federal habeas corpus proceedings, and that State post conviction proceeding are governed exclusively by the Post Conviction Act.

Petitioner is arguing that the "new rule" analysis in *Teague* is applicable only to federal habeas corpus proceedings and not to state post conviction proceedings. Therefore he claims that the *Booth* decision should be applied retroactively to his case, even if *Booth* established a "new rule".

The new rule analysis of *Teague* is applicable to state post conviction proceedings. The Court in *Teague* explained that it was announcing a new rule analysis regarding the retroactive application of new rules to cases on collateral review, because the new rule analysis is vital to the underlying principles of uniformity and finality which are compelling in the criminal context. *Teague,* 489 U.S. at 309. The Court pointed out that: "[N]o one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Id.* at 309 (quoting *Mackey v. United States,* 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part)).

Furthermore, the United States Supreme Court in *Sawyer* stated that the new rule standard established in *Teague* serves to "validate reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Sawyer*, 110 S.Ct. 2822, 2827 (1990).

Reasoning would dictate that the new rule analysis of *Teague* is applicable to state post conviction proceedings, not only to preserve the principles of uniformity and finality, but also because habeas corpus and post conviction proceedings are similar in nature and provide similar relief. Both proceedings are collateral remedies and are available to defendants only after their convictions have become final. Both procedures serve as an incentive for trial and appellate judges to conduct their proceedings in a manner consistent with established constitutional procedures. The Court in *Teague* explained:

> [T]he threat of habeas serves as a necessary incentive for *trial* and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles. In order to perform this deterrence function, the habeas court need only apply the constitutional standards that prevailed at the time the original proceeding took place.

Teague, 489 U.S. at 306 (emphasis added). Likewise, the availability of post conviction relief serves as a necessary incentive for state trial and appellate judges to conduct their proceedings in a manner consistent with constitutional principles that prevail at the time of the proceedings. Consequently, for the above reasons the new rule analysis of *Teague* applies to state post conviction proceedings and Petitioner's argument must be dismissed as erroneous.

C. Pursuant to section 645A(d) of the Maryland Post Conviction Procedure Act Petitioner is entitled to the retrospective application of the *Booth* decision.

Petitioner argues that the *Booth* decision imposes upon the Maryland courts a procedural or substantive standard not previously recognized, and that therefore the Maryland Uniform Post Conviction Procedure Act, codified in the Maryland Annotated Code at Article 27, section 645A, requires that the Petitioner receive the benefit of the *Booth* decision. Section 645A(d) provides:

> (d) Decision that Constitution imposes standard not heretofore recognized.
>
> —For the purposes of this subtitle and notwithstanding any other provision hereof, no allegation of error shall be deemed to have been finally litigated or waived where, subsequent to any proceeding in which said allegation otherwise may have been waived, any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or of Maryland imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized, which such standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

Md. Ann. Code art., 27 sec. 645 (1957).

Petitioner's argument must be dismissed because section 645A(d) explicitly states that such procedural or substantive standards should be applied when "such standard is intended to be applied retrospectively". *Id.* As previously stated in issue I, part A of this opinion *supra* the decision in *Booth* which prohibits the use of victim impact evidence in a capital sentencing proceeding is not to be applied retroactively to Petitioner's case. Since section 645A(d)

only speaks to rules which are intended to be applied retrospectively, the Petitioner is not entitled to the application of the *Booth* decision under section 645A(d).

II. THE SENTENCING FORM SUBMITTED TO THE JURY UNCONSTITUTIONALLY REQUIRED UNANIMITY IN DETERMINING MITIGATING FACTORS

Petitioner alleges that the sentencing form used in his case was identical to the form that was struck down in the case of *Mills v. Maryland*, 486 U.S. 367 (1988). Petitioner suggests that the form which was submitted to the jury was violative of rights guaranteed by the Maryland Declaration of Rights and the Eighth and Fourteenth Amendments to the United States Constitution.

In the *Mills* case an inmate at a state prison was tried and convicted of murdering his cellmate. In the sentencing phase the jury was provided with a verdict form, parts of which (1) provided the jury with a list of several mitigating circumstances which could be checked "yes" or "no", preceded by a statement that the jury "unanimously find[s] that each of the following mitigating circumstances which is marked 'yes' has been proven to exist" by a preponderance of the evidence; and (2) asked the jury to affirm or deny that it unanimously found that the mitigating circumstances marked "yes" outweighed aggravating circumstances found in a previous section. The trial judge's instructions emphasized that all jury determinations had to be unanimous, including findings as to mitigating circumstances.

The Court of Appeals of Maryland concluded that the imposition of the death sentence was constitutionally sound. *Mills v. State*, 310 Md. 33, 527 A.2d 3 (1987), *rev'd*, 486 U.S. 367 (1988). The United States Supreme Court vacated the judgment of the Court of Appeals of Maryland insofar as it had sustained the imposition of the death penalty, finding the unanimity requirement prevented the jury's

consideration of mitigating circumstances. The Court stated:

> We conclude that there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider al mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

Mills, 486 U.S. at 384.

An examination of the record in Petitioner's case provides that the sentencing form used in his case is the same or substantially similar to the form used in *Mills,* and in Petitioner's case the trial judge did instruct the jurors that their decision as to mitigating circumstances had to be unanimous. (Tr.p.195). Therefore, Petitioner argues this Court should apply the holding in *Mills* retroactively pursuant to the provisions of *Colvin v. State,* 314 Md. 1, 548 A.2d 506 (1988).

The State argues that the Petitioner is not entitled to relief under *Mills* because the *Mills* case was decided after Petitioner's case was finally litigated and the *Mills* rule does not satisfy the test governing the retroactive application of new rules that was established in *Teague v. Lane,* 489 U.S. 288, (1989).

As has been previously explained in this opinion, the *Teague* Court established that in general newly declared rules should be applied only to cases pending on direct review and not to cases on collateral review, *Teague,* 489 U.S. at 301, but did set forth two exceptions to this gen-

eral rule. The Court held that if the new rule (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe or (2) the new rule requires the observance of those procedures that are implicated in the concept of ordered liberty" then the new rule should be applied retroactively to cases on collateral review. *Id.* at 307.

The *Teague* Court further established that a new rule is created when it breaks new ground or imposes a new obligation on the State or the Federal Government, or the resulting rule was not dictated by precedent existing at the time the conviction became final. *Id.* at 301. The Supreme Court extended the new rule standard of *Teague* to capital sentencing proceedings in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

As the issue of post conviction is a matter involving collateral review, this court must decide whether *Mills* is a new rule, and if so, whether one of the two *Teague* exceptions apply.

Mills meets the new rule standard articulated in *Teague*, as it was not dictated by prior precedent. *McDougall v. Dixon*, 921 F.2d 518 (4th Cir. 1990). Accordingly, this Court must determine if one of the two *Teague* exceptions applies.

The *Mills* decision does not place a class of people beyond the power of the State to impose the penalty of death. Therefore the first exception has no application. *See, Williams v. Dixon*, No. 89-4001 slip op. (4th Cir. filed March 3, 1992).

In determining whether the second exception to *Teague* applies, this Court needs to look to the United States Supreme Court's decision in *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822 (1990), wherein the Court explained that to satisfy the second exception, a new rule must fulfill two requirements:

> It is just not enough under *Teague* to say that a new rule is aimed at improving the accuracy of the trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "alter our understanding of the *bedrock procedural elements*" essential to the fairness of a proceeding.

Sawyer, 110 S.Ct. at 2831 (emphasis in original).

The Fourth Circuit Court of Appeals in the *Williams* case held that the rule in *Mills* was aimed at increasing the accuracy of the trial, thereby satisfying the first requirement of the second exception in *Teague.* "All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense." *Williams,* No. 89-4001, slip op. at 10 (quoting *Sawyer,* 110 S.Ct. at 2831).

In *Williams,* the Fourth Circuit made it clear that the *Mills* rule also satisfies the second requirement of the second exception in *Teague.* The *Williams* court reasoned that an individualized sentencing determination is the most fundamental right recognized at the capital sentencing hearing and that a unanimity requirement, as was provided in *Mills* (and in Petitioner's case), is "arbitrary" and "capricious". *Williams,* No. 89-4001, slip op. at 12, 13. The court quoted from *McKoy v. North Carolina,* ___ U.S. ___, 110 S.Ct. 1227 (1990), wherein the Supreme Court addressed the arbitrary and capricious nature of the imposition of the death penalty on the basis of one juror's vote: "Given this description, it is apparent that the result in *Mills* fits within our line of cases forbidding the imposition of capital punishment on the basis of 'caprice' in 'an arbitrary and unpredictable fashion,' or through 'arbitrary' or 'freakish' means." *Williams,* No. 89-4001, slip op. at 13 (quoting *McKoy,* 110 S.Ct. at 1239). The *Williams* court, in holding that *Mills* clearly met the second requirement of the second *Teague* exception, stated, "the rules in *Mills* and

McKoy are 'bedrock procedural elements' and are 'implicit in ordered liberty'." *Id.* at 13.

The State contends that Petitioner's case is distinguishable from the *Mills* case in that the *Mills* jury found no mitigating circumstances and therefore never got to the weighing process outlined on the sentencing form. It is not contested that Petitioner's jury did find two mitigating factors to exist.

The State reasons that since the jury found two mitigating circumstances, there must not have been any confusion on the part of the jury in light of the sentencing form and the court's instructions. The State fails to mention in its memorandum that prior to the jury's sentencing deliberations, the State admitted that the two mitigating circumstances existed (numbers one and six), that Judge Simpkins so advised the jury, and that the sentencing form was marked accordingly. (Tr. pp. 193-194). What we do not know is the nature of the jury's deliberations as to other mitigating circumstances. Given the unanimity requirement of Petitioner's sentencing form and the Judge's instructions, this Court cannot be certain that it might not have been possible for some of the jurors, or even an individual juror, to have found other mitigating circumstances that may have altered the jury's determination to impose a penalty of death.

The Court in *Mills* was clear in stating that under the capital sentencing scheme in Maryland at the time of that case, one holdout juror could unconstitutionally prevent the other eleven from considering mitigating evidence. *Mills*, 486 U.S. at 374. Justice Blackmun, writing for the majority, stated, "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated by petitioner." *Id.* at 374. The Justice went on to write, "[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is

unacceptable and incompatible with the commands of Eighth and Fourteenth Amendments." *Id.* at 377 (quoting *Lockett v. Ohio,* 438 U.S. 586, 605 (1978)).

This Court finds little, if anything, to distinguish Petitioner's case from *Mills.* This Court believes that the law, as it currently exists, provides that *Mills* applies retroactively to Petitioner's case, and that the Petitioner should be allowed a new sentencing.

III. PETITIONER'S CONVICTIONS AND SENTENCES ARE NOT VOID FOR JURISDICTIONAL REASONS

Petitioner argues that counts one and two of the indictment are void because jurisdiction for those counts did not lie in Baltimore County. Petitioner submits that, at all times, the alleged crimes charged in counts one and two of the State's indictment occurred while he was confined in the Baltimore City Jail. Therefore, Baltimore County was without jurisdiction to try him as an accessory to commit murder. Petitioner points to Article 27, section 586A, which reads in pertinent part as follows: "in like manner an accessory to murder or felony committed shall be tried by the Court within whose jurisdiction such person became accessory." Md. Ann. Code art. 27, sec. 586A (1957).

In *McBurney v. State,* 280 Md. 21, 371 A.2d 129 (1977), the Court of Appeals of Maryland indicated that "[t]here are two facets to the jurisdiction of a court—jurisdiction over the subject matter and venue." *Id.* at 31, 371 A.2d at 135. Interestingly, the provisions of the Maryland Code referred to by Petitioner are found in a section titled "Venue, Procedure and Sentencing' and subtitled "Venue". Indeed the argument advanced by Petitioner seems to be an issue of jurisdiction only as it relates to venue. Section 4-302 of the Courts and Judicial Proceeding Article, which sets forth the applicable Maryland law on felony criminal jurisdiction, states clearly that a circuit court of this state has common law jurisdiction in all criminal cases commit-

ted in Maryland except where limited by law. Md. Code Ann., Cts. & Jud. Proc. section 4-302 (1985).

The *McBurney* court further stated that "subject matter being the essential test of jurisdiction, venue may be waived in a criminal case, expressly or by failure to make a timely objection. Timely objection to venue is one interposed no later than the first pleading to the charge." *McBurney,* 280 Md. at 31, 371 A.2d at 125. Contrary to the contentions of the Petitioner, this Court believes that the issue advanced herein was raised in Petitioner's appeal. In *Grandison v. State,* 305 Md. 685, 506 A.2d 80 (1986), the Court of Appeals of Maryland, in noting that venue was waived, stated: "The short answer to appellant's contention is that venue for the murder and handgun counts was never challenged in the trial court." *Id.* at 702, 506 A.2d at 588. The court went on to further address the argument and concluded that even if the issue had been properly raised, it would be without merit because "[a]s a co-conspirator, Grandison became criminally responsible for the acts of his fellow conspirators; acts which were committed in Baltimore County. Since the record reveals that in this conspiracy Grandison played a principal role, he is subject to venue at this situs of the crime." *Id.* at 704, 506 A.2d at 589.

Article 27, section 645A(a), provides that an issue that has been fully litigated is not properly the subject of a post conviction proceeding. This Court believes that Petitioner's allegation relates to venue and that issue has been fully litigated on direct appeal. For reasons stated herein the Court believes that Petitioner's allegation is without merit.

IV. JURISDICTION WAS PROPER AS TO THE THIRD COUNT OF THE INDICTMENT AND THE PETITIONER WAS PROPERLY CHARGED

Petitioner contends that the third count of the indictment, regarding an alleged conspiracy between Petitioner

and others to murder David Scott Piechowicz and Susan Carol Kennedy was defective in that it failed to name the victims. Therefore, Petitioner argues that he was found guilty and sentenced to a term of life imprisonment for a conspiracy not charged in the indictment.

Petitioner attempts to bring this issue before the Court in post conviction review as an issue of subject matter jurisdiction. Actually, the issue raised relates to an alleged defect in the indictment and is not a question of jurisdiction.

Article 27, section 40 requires only a brief statement of the object of the conspiracy. Furthermore, the Court of Appeals of Maryland in *Campbell v. State,* 325 Md. 488, 601 A.2d 667 (1992), stated: "it . . . is not required that the object of the unexecuted conspiracy should be set out with great particularity and certainty in the indictment, because only such facts need be stated as shall fairly and reasonably inform the accused of the offense with which he is charged." *Id.* at 496, 601 A.2d at 671 (quoting *Lanasa v. State,* 109 Md. 602, 608-09, 71 A. 1058, 1060 (1909)). The *Campbell* court reasoned that "[t]his is consistent with the fact that the offense of which the accused is required to be informed is the conspiracy, rather than the crime which is its object." *Campbell,* 325 Md. at 497, 601 A.2d at 671.

A review of the third count indicates that the count was framed in such a manner as to inform the Petitioner of the charge against him so that he could prepare his defense and protect himself against a subsequent prosecution for the same offense.

Assuming *arguendo* that there was a defect in the indictment, the record is clear that Petitioner failed to raise the issue within the time required by Maryland Rule 4-252(a)(2), or on appeal. In *Bowie v. State,* 234 Md. 585, 200 A.2d 557 (1963), the Court of Appeals stated, "Maryland has held consistently that a defective or inartificial

indictment, at least if it charges an offense, cannot be tested or reviewed on habeas corpus or post conviction, although it might have been vulnerable to direct timely attack." *Id.* at 595, 200 A.2d at 562. Accordingly, even if there had been a defect in the third count of the indictment, Petitioner has waived his right to raise the issue by failing to do so in timely fashion.

Furthermore, Maryland Rule 4-241(a) gives the Petitioner an opportunity to file a demand for a bill of particulars, to which the State would have had to reply. Petitioner, however, failed to make this demand.

This Court is of the opinion that the third count of Petitioner's indictment was not defective and therefore would not have been vulnerable to a timely attack, but even if it had been defective, the issue is not a proper subject for post conviction review. For the above stated reasons Petitioner's argument must be dismissed.

V. THE EVIDENCE WAS LEGALLY SUFFICIENT TO CONVICT THE PETITIONER OF THE USE OF A HANDGUN IN THE COMMISSION OF A FELONY OR CRIME OF VIOLENCE.

Petitioner was convicted pursuant to Article 27, section 36(B)(d) of the use of a handgun in the commission of a felony or a crime of violence. Petitioner now contends that his sentence and conviction are invalid, because the State failed to prove the required elements of a handgun. He alleges that the description of the MAC-11 (the alleged weapon) was so grossly insufficient that the State merely proved that the MAC-11 was either a handgun or a machine gun. For the following reasons, Petitioner's claim must be denied.

Petitioner has waived this issue under the Maryland Uniform Post Conviction Act, Article 27, section 645A(c), which states in pertinent parts:

> (c) When allegation of error deemed to have been waived.—(1) For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal, . . . or in any other proceeding actually instituted by said petitioner, unless the failure to make such an allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.
>
> (2) When an allegation of error could have been made before trial, at trial, on direct appeal . . . but was not in fact so made there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

Md. Ann. Code art. 27, sec. 645A(c) (1957).

The court in *Davis v. State,* 285 Md. 19, 400 A.2d 406 (1979), analyzed Article 27, section 645A(c) and determined the scope or applicability of its waiver provision. The court held:

> [i]n view of the ambiguity associated with the term 'waiver', we [did] not feel compelled by the language of section 645A to apply the 'intelligent and knowing' standard to all allegations made in post conviction actions," but only to those matters falling within the scope of subsection (c).

Id. at 33, 400 A.2d at 412 (quoting *Curtis v. State,* 284 Md. 132, 149, 395 A.2d 464 (1978)). The *Davis* court determined that the "intelligent and knowing" standard of section 645A(c) was applicable to issues such as Sixth Amendment right to counsel and trial by jury, the Fifth Amendment self-incrimination privilege and the Double Jeopardy Clause. *Id.* at 33, 400 A.2d at 413. The *Davis*

court, in determining what issues or circumstances did not fall within the "intelligent and knowing" standard, held:

> it [was] clear that a 'procedural default' in certain circumstances, even where a defendant may personally have been without knowledge or understanding of the matter, may result in his being precluded from asserting important rights . . . A defendant may forego a broad spectrum of rights which are deemed to fall within the category of tactical decision by counsel or involve procedural defaults.

Id. at 35, 400 A.2d at 412. In essence, the *Davis* court applied the "intelligent and knowing" waiver standard only to rights which were deemed fundamental and all other rights were waived by general waiver principles.

The Court of Special Appeals, in *State v. Torres*, 86 Md. App. 560, 587 A.2d. 582 (1991), recently analyzed the law regarding waiver of postconviction allegations. The court essentially restated the holdings of the *Davis* court and added the following:

> (1) [T]he *Johnson v. Zerbst* [citation omitted] intelligent and knowing standard applies only to the waiver . . . of fundamental constitutional rights . . .
>
> (2) The determination of whether a particular right is such a fundamental right that an intelligent and knowing waiver must be proved and cannot be presumed or deemed must be decided on a case-by-case basis.

Id. at 566-68, 587 A.2d at 585.

The *Torres* court suggested the following procedure to determine if an issue has been waived for purposes of post conviction:

> (1) [C]onsider whether the allegation could have been raised before. If it could, the judge must then decide whether the allegation has been waived.

(2) [I]f the right is a fundamental right, waiver, measured by the "intelligent and knowing" standard, must be proved.

(3) [I]f the right is a non-fundamental right, however, the intelligent and knowing standard does not apply and waiver is determined by general legal principles.

Id. at 568, 587 A.2d at 585.

In the present case, the Petitioner's allegation of insufficient evidence does not constitute a claim of fundamental right. In *Lyde v. Warden,* 1 Md. App. 423, 230 A.2d 695 (1967), the petitioner alleged, in a post conviction petition, that the evidence was so insufficient as to deny him a constitutional right to a fair trial and to due process of law. *Id.* at 427, 230 A.2d at 697. The *Lyde* court denied the constitutional claim, because the court was satisfied that the State made a showing of some evidence as opposed to no evidence.

In order to Petitioner's claim to constitute a fundamental right, the State must have presented not merely insufficient evidence as to the handgun, but no evidence at all. This is not the case. The State proved through the testimony of Agent Robert Seibert that the weapon was a handgun within the meaning of Md. Ann. Code article 27, section 36B. *See infra* issue "XIV". Petitioner's case clearly constitutes a non-fundamental right, to which general waiver principles apply. Therefore, Petitioner waived this issue by failing to raise it at trial or on appeal. *See, Grandison,* 305 Md. 685, 506 A.2d 580 (1986).

Even if Petitioner's claim constituted a fundamental right, he has waived the claim under the "intelligent and knowing" standard. When an allegation of error could have been made, and was not, a rebuttable presumption exists that the Petitioner intelligently and knowingly failed to make such allegation. *Curtis v. State,* 284 Md. 132, 395

A.2d 464 (1978). Furthermore, the court in *Torres* stated that the test to determine if a person has "intelligent and knowingly" failed to raise an issue is "whether [the petitioner] was previously aware of and understood the possible defense." *Torres*, 86 Md. App. at 565, 587 A.2d at 585. Petitionr represented himself at trial and on appeal with the limited assistance of standby counsel. Petitioner has also filed numerous briefs with this Court concerning not only this issue but other complex legal issues. It is the opinion of this Court that the Petitioner has failed to rebut the resumption of an intelligent and knowing waiver of this issue, had that standard been determinative.

Furthermore, the Court of Appeals of Maryland has long held that insufficiency of evidence is not a claim cognizable under the Post Conviction Act, Article 27, section 645A(e). *Thornton v. Warden*, 241 Md. 715, 216 A.2d 894 (1966). For the above reasons Petitioner's claim must be denied.

VI. THE STATE DID NOT FAIL TO COMPLY WITH THE REQUIREMENTS OF ARTICLE 27, SECTION 412(b), AND THEREFORE PETITIONER'S TWO SENTENCES OF DEATH ARE NOT INVALIDATED

Petitioner has made three arguments in this section alleging that his death sentences are void. First, Petitioner contends that the single death notice served by the States on September 7, 1983 was insufficient and violated the strict requirements of the Annotated Code of Maryland, Article 27, section 412(b). Petitioner claims that section 412(b) requires that the State's Attorney serve two separate written notices of its intention to seek the sentences of death when a defendant, like Petitioner, is charged with two separate first degree murder offenses. Petitioner's claim is erroneous and must be dismissed because section 412(b) does not require the State to serve two separate notices.

Article 27, section 412(b) explicitly states that if the State seeks the sentence of death for a charge of first degree murder the State must:

> (1)(i) notif[y] the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and
>
> (ii) a sentence of death is imposed in accordance with section 413;

Md. Ann. Code art. 27, sec. 412(b)(1) (1957).

Section 412(b)(1) merely requires that, in order to impose the sentence of death for first degree murder, the State must notify the defendant before trial that they are seeking the death sentence. The State provided this notice to defendant on September 7, 1983. The notice specifically stated that "the State hereby notifies you, the Defendant [the Petitioner] in the above indictment, that the State intends to seek a sentence of death if you are found guilty of Murder in the First Degree in Indictment Number 83-CR-2340." (*See* Tr. 63-64). Indictment number 83-CR-2340 charged the Petitioner with two counts of first degree murder, one count of conspiracy to commit murder, and one count of use of a handgun in the commission of a felony or a crime of violence. Therefore, since the indictment contained two counts of murder in the first degree and the State's Attorney's notice stated that it was seeking the death sentence for first degree murder contained in the indictment, the Petitioner was put on notice that the State intended to seek the death sentence for both counts of first degree murder contained in the indictment.

In other words, if the State's notice contained wording to the effect that the State was seeking the death sentence for murder in the first degree, in count one of the indictment, then the single notice may not have been sufficient. However, this was not the case. Furthermore, Petitioner was tried for both counts of first degree murder at the same trial, therefore, the single notice was sufficient

to advise the Petitioner that the State was seeking the death penalty for both murders. The single notice given to defendant clearly satisfied section 412(b)(1).

Second, Petitioner claims that the court did not have jurisdiction to initiate the death penalty proceedings under Article 27, section 413(a). Petitioner argues that section 413(a) mandates that the notice requirement of Article 27, section 412(b) must be complied with before the court can impose the sentence of death. Petitioner again argues that the single notice served on him was not sufficient, because he was charged with two counts of first degree murder. Consequently, he contends Article 27, section 412(b) was not complied with, and therefore, the court did not have proper jurisdiction to impose the death penalty under section 413(a). As previously stated, the State complied with the notice requirement of section 412(b) by providing the defendant on September 7, 1983 with notice of its intent to seek the death penalty for first degree murder contained in indictment number 83-CR-2340. Article 27, section 413(a) states in pertinent parts:

> (a) if the State had given the notice required under section 412(b) a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death.

Md. Ann. Code art. 27, sec. 413(a) (1957). The court, therefore, properly imposed the sentence of death as to both counts of murder under section 413(a) and section 412(b).

Finally, Petitioner contends that the deficiency in the death notice requirement under Article 27, section 412 is similar to an indictment which charges no cognizable offense. Petitioner claims that therefore the issue is one of jurisdiction which is cognizable under the Post Conviction Act and has not been waived by failure to raise the issue at trial or on appeal. Petitioner's claim does not raise a question of jurisdiction because the court complied with all

the jurisdiction requirements for imposing the death penalty under section 413(a) and 412(b).

Even if the death notice had been deficient, Petitioner's claim is clearly a procedural defect which Petitioner has waived by failing to raise this issue at any time before, during, or after trial. Article 27, section 645A(c) of the Post Conviction Act states in pertinent parts:

> (c) When allegation of error deemed to have been waived.—(1) For the purposes of this subtitle an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal, . . . or in any other proceeding actually instituted by said petitioner, unless the failure to make such an allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.
>
> (2) When an allegation of error could have been made before trial, at trial, or direct appeal . . . but was not in fact so made there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

Md. Ann. Code art. 27, sec. 645A (1957).

The court in *Davis v. State*, 285 Md. 19, 400 A.2d 406 (1979), analyzed section 645A(c) and determined the scope or applicability of its waiver provision. The court held:

> [i]n view of the ambiguity associated with the term 'waiver', we [did] not feel compelled by the language of section 645A to apply the "intelligent and knowing" standard to all allegations made in post conviction actions," but only to those matters falling within the scope of subsection (c).

Id. at 33, 400 A.2d at 412 (quoting *Curtis v. State*, 284 Md. 132, 149, 395 A.2d 464 (1978)). The *Davis* court in determining what issues or circumstance did not fall within the "intelligent and knowing" standard held:

> it [was] clear that a 'procedural default' in certain circumstances, even where a defendant may personally have been without knowledge or understanding of the matter, may result in his being precluded from asserting important rights . . . A defendant may forego a broad spectrum of rights which are deemed to fall within the category of tactical decision by counsel or involve procedural defaults.

Id. at 35, 400 A.2d at 412. Petitioner's claim, therefore, was waived by his failure to raise the issue at trial or in any of the subsequent appeals.

Even if Petitioner's claim constituted a fundamental right, thereby requiring an "intelligent and knowing" waiver, he has waived the claim. Section 645(c)(2), *supra* provides that when an allegation of error could have been made, and was not, a rebuttable presumption exists that the Petitioner intelligently and knowingly failed to make such an allegation. *Curtis v. State*, 284 Md. 132, 395 A.2d 464 (1978). In this case, Petitioner has failed to rebut the presumption of a knowing and intelligent waiver.

VII. THE REMOVAL ORDER ISSUED BY THE BALTIMORE COUNTY CIRCUIT COURT WAS VALID

Petitioner's contention is based upon, and dovetails with, the argument advanced in issue "VI" of this opinion. In issue "VI" Petitioner contends that the death penalty notice was defective because it failed to comply with the requirements of Article 27, sec. 412.[5] Specifically,

[5] Counts one and two of the indictment charge the offenses of first degree murder of David Scott Piechowicz and Susan Carol Kennedy respectively. On September 7, 1983, the State provided notice that it intended to seek the death penalty if the Defendant were to be found guilty of the indictment.

Petitioner contends that the State did not notify Petitioner for which victim it was seeking the death penalty because there were two victims and only one notice of death. Therefore, Petitioner claims that it was necessary to provide two separate death notices. Relying on his arguments, Petitioner concludes that the defective nature of the death notices rendered counts one and two non-capital offenses. Therefore, he was not entitled to an automatic removal as provided in Maryland Rule 744.[6]

For the reasons stated in the Court's opinion relative to allegation "VI" and the reasons herein, Petitioner's claim is without merit. The State fully complied with the provisions of Article 27, Sections 412(b)(1) and 413(a) *supra*. But even if the State had not complied as required, it is clear that Petitioner failed to raise the issue before or during his trial, his sentencing proceeding, or on appeal. Failure to raise the argument constitutes a waiver under the provisions of Article 27, section 645(c). *Curtis v. State*, 284 Md. 132, 395 A.2d 464 (1978); (*see* Court's opinion issue "VI").

VIII. REMOVAL OF PETITIONER'S CASE COMPLIED WITH THE APPROPRIATE MARYLAND RULES OF PROCEDURE

Petitioner filed an affidavit on November 23, 1983, for removal of his case from Baltimore County to Somerset County. Petitioner is now alleging that the removal of his case from Baltimore County to Somerset Count was not done in compliance with Maryland Rule 1200(c)(2)(b), which states:

> In the interest of expediting the trial of a removed action, criminal cause, or issue, and of equalizing judicial work loads to the extent feasible, it shall be the duty of a judge, before exercising removal authority designating a Court within his judicial circuit to which

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[6] Now Maryland Rule 4-254(b)(1).

> such action, criminal cause, or issue shall be removed, to obtain the approval of the Circuit Administrative Judge for such designation. It shall also be the duty of a judge, before exercising removal authority to a jurisdiction without the judicial circuit, to make inquiry of the Circuit Administrative Judge of the Circuit to which it is proposed to make the removal concerning the trial calendar and judicial work loads of any Court to which it is contemplated the action, criminal cause, or issue may be removed and to give consideration to the recommendations of such Circuit Administrative Judge. The Circuit Administrative Judge, in the interest of expediting the removal process, may at any time or from time to time delegate his approval authority under this Rule to any judge or judges within his judicial circuit.

Md. Rule 1200(c)(2)(b).

Petitioner suggests that the rule required the approval of the Circuit Administrative Judge of the First Judicial Circuit before a trial may be removed to that circuit. At the time relevant to Petitioner's case, Judge Richard M. Pollitt, Jr. was the Circuit Administrative Judge.[7] Petitioner's alleges that Judge Lloyd L. Simpkins and not Judge Pollitt approved the removal from Baltimore County to Somerset County. In support of his allegation, Petition refers to an excerpt from his trial transcript:

> Sometime in mid-December, I don't know the exact date, I got a phone call from Judge Cicone asking me if this matter could be tried in this county and it was around the 15th, 16th, 17th, 18th—somewhere along in there—a few days before the Christmas holidays *and I told him he could.* I was told it was going

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[7] The First Judicial Circuit of Maryland consists of the counties of Dorchester, Somerset, Wicomico and Worcester.

to be a trial that would take five or six weeks. (Tr. 88) (emphasis in Petitioner's brief).

The only evidence submitted by Petitioner in support of his allegation is the excerpt referred to above. There is no evidence before this Court to suggest that Baltimore County Circuit Court Judge Frank Cicone did not, prior to this December 16, 1983 order removing Petitioner's case, make inquiry of the Circuit Administrative Judge concerning the trial calendar and judicial work loads of any court within the First Judicial Circuit as provided by the Rule.

Likewise, there is no evidence that Judge Simpkins did not have the authority from Judge Pollitt to accept the removed case. In fact Rule 1200(c)(2)(b) provides: "The Circuit Administrative Judge, in the interest of expediting the removal process, may at any time or from time to time delegate his approval authority under this Rule to any judge or judges within his judicial circuit." Md. Rule 1200(c)(2)(b).

In the absence of specific evidence in support of his allegations, Petitioner's claim is little more than a bald assertion which does not constitute a ground for post conviction relief. *Austin v. Director of Patuxent Institution*, 237 Md. 314, 206 A.2d 145 (1964).

Assuming *arguendo* that Judge Cicone did not receive the express approval to remove Petitioner's case from Baltimore County to Somerset County from Judge Pollitt, the purpose of Rule 1200(c)(2)(a), together with the standards and principles that govern the Maryland Rules of Procedure, suggest that Judge Simpkins was acting within the authority of the rules. This Court notes that the obvious purpose of the Rule is to provide for the orderly administration of the courts, and although the Circuit Administrative Judge is responsible for the administration of the several courts within his judicial circuit, Maryland Rule 1200(c)(2)(a) provides for much of the authority for the

assigning of cases to lie with the County Administrative Judge. Maryland Rule 1211 also provides that it is the duty of the County Administrative Judge to "supervise the assignment of actions for trial in his court to the end that maximum use of available judicial man power is obtained, and pending actions brought to trial and disposed of as expeditiously as feasible." Maryland Rule 1200(d)(4), furthermore, provides that in any county where there is but one resident judge of the Circuit Court (as is the case in Somerset County), such judge shall exercise the power and authority of a County Administrative Judge.

When interpreting the rules of procedure, courts are to use the same standards that they would use to interpret statutes. *In re Leslie M.*, 305 Md. 477, 481, 505 A.2d 504, 507 (1986). Therefore, since Rules 1200(c)(2)(a), 1200(d)(4), and 1211 are related court rules, they should be construed to harmonize with each other and not produce unreasonable results. *Id.* The Court also takes note of the principle that Maryland Rules of Procedure should be liberally construed so as to effectuate their purpose and do justice between parties. *Miller v. Talbot*, 239 Md. 382, 211 A.2d 741 (1965). It is obvious in this case that Judge Simpkins was the judicial officer better able to gauge his court's workload, the nature of his court's trial calendar and to make the determination as to removal.

This Court is not convinced that there is sufficient evidence to support Petitioner's allegation that Judge Simpkins did not in fact seek the permission of Judge Pollitt before accepting the removal of the case. Even if there was such evidence, however, this court finds no prejudice to Petitioner, especially in light of the general purpose of Rule 1200, the rules of interpretation, and the principle of liberal construction. The Petitioner's contention must fail.

IX.&X PETITIONER'S SENTENCE OF DEATH FOR THE MURDER OF SUSAN KENNEDY IS NOT VOID BECAUSE THE TRIAL JUDGE FAILED TO GIVE THE JURY AN INSTRUCTION UNDER THE TRANSFERRED INTENT DOCTRINE, AN ELEMENT THE PETITIONER ALLEGES WAS REQUIRED TO BE FOUND IN ORDER TO PROVE THE AGGRAVATING CIRCUMSTANCES UNDER ARTICLE 27, SECTION 413(d)(7)

Petitioner contends that the State maintained throughout the trial that Susan Kennedy was murdered by mistake. The State, therefore was required to prove that Cheryl Piechowicz was the intended victim and Susan Kennedy (the murdered victim) was killed instead of the intended victim, and as such, Petitioner's intent toward the intended victim was transferred to Susan Kennedy. Consequently, the only way the sentencing jury could find sufficient evidence to prove the aggravating circumstances under Article 27, section 413(d)(7) was through the transferred intent doctrine. Therefore, he alleges, the trial judge was required to give the jury an instruction regarding the doctrine of transferred intent.

In essence, the Petitioner is arguing that the sentence should be void because of the lack of a proper jury instruction. The Petitioner's claim must be denied because failure to properly instruct the jury is not an issue cognizable under the Post Conviction Act. The court in *Matthews v. Warden*, 223 Md. 649, 162 A.2d 452 (1960), held that a claim of an improper jury instruction by the trial judge "goes to the regularity of the proceedings at trial, and may be reviews on direct appeal if properly reserved, but is not for review on post conviction."

Similarly, Petitioner's claim is not cognizable under section 645A(b), because this issue was previously and finally litigated. In Petitioner's direct appeal to the Court of Appeals of Maryland, he raised the issue of insufficiency of evidence regarding the conviction of Susan Kennedy's

murder. The court, in upholding the conviction, stated, "Susan Kennedy's death was the result of willful, deliberate and premeditated intent to kill for which Grandison is responsible." *Grandison*, 305 Md. 685, 506 A.2d 580 (1986).

Furthermore, Petitioner has waived this issue. The court in *Davis v. State*, 285 Md. 19, 400 A.2d 406 (1979), held that the right to a correct jury instruction "falls within the category of being waived other than by the "intelligent and knowing" standard of section 654A(c). *Id.* at 34-5, 400 A.2d at 412. This issue, therefore, has been waived by Petitioner because he failed to raise it before, during or after trial, or on direct appeal. For the above stated reasons Petitioner's claim must be dismissed.

XI. THE SENTENCES OF DEATH BY THE SENTENCING JURY ARE NOT VOID

Petitioner contends that his sentences of death by the sentencing jury are void because the State failed to produce evidence at the sentencing hearing to substantiate the aggravating factor that the Petitioner engaged or employed another person to commit the murder of Susan Kennedy and that the murder was committed pursuant to an agreement or contract, as required by Article 27, section 413(d)(7). Petitioner alleges that the only evidence introduced by the State for the consideration of the sentencing jury was the victim impact statement and live testimony of the victims' family members.

The State avers that Maryland's statutory sentencing provisions did not require the reproduction of the evidence from the trial at the sentencing phase.

Article 27, sec. 413(d)(7) provides:

> In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

> (7) The Defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.[8]

Md. Ann. Code art. 27 sec. 413(d)(7) (1957). The statue does not specify the manner in which the alleged aggravating circumstances be proven, but it does list the types of evidence that are admissible at the sentencing proceeding. Additionally, Article 27, section 413(c)(iv) requires that an aggravating circumstance be proven beyond a reasonable doubt.

The sentencing in Petitioner's case was before the same jury that determined the Defendant's guilt. The State introduced and adopted all of the evidence presented at Petitioner's trial as to guilt or innocence at the sentencing phase.

The Court of Appeals, in an analysis of Maryland's capital sentencing statute, reaffirmed the position that indeed trial and sentencing are difference procedures:

> The sentencing phase of the proceeding involves (1) a determination by the sentencing authority of whether the aggravating circumstances relied upon by the State to justify imposition of the death sentence have been established by the evidence beyond a reasonable doubt and (2) a determination of whether mitigating circumstances upon which the defendant has placed reliance have been established by a preponderance of the evidence. Thus, the issue for determination is different in each proceeding, although manifestly a by-product of the evidence adduced at the trial will reveal, to some extent at least, the ex-

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[8] The only aggravating circumstance the State alleged was the contract murder provision of Article 27, Section 413(d).

> istence or absence of aggravating and/or mitigation circumstances.

Tichnell v. State, 290 Md. 43, 59, 427 A.2d 991, 999 (1981). The court acknowledged, however, that, as in Petitioner's case, the capital sentencing statute contemplated that the sentencing procedure will ordinarily be conducted before the same jury that determined the Defendant's guilt and would, therefore, have before it all the evidence presented in the case. "In such circumstances, the purpose of the separate sentencing hearing would be to provide an opportunity to present additional evidence as to the existence of aggravating and/or mitigating circumstances." *Id.* at 53, 427 A.2d at 991. The court went on to say:

> In the usual case in which the prosecution seeks the death penalty and obtains a qualifying first degree murder conviction, the trial judge and jury which heard the evidence at trial will also be involved in the subsequent sentencing proceeding; therefore, they will be full conversant with the evidence introduced prior to the commencement of the sentencing hearing.

Id. at 59-60, 427 A.2d at 999. The issues before the jury for its determination may have been different at sentencing from that decided at the guilt/innocent phase, nonetheless the issues on sentencing were indeed by-products of the evidence produced at the trial.

As to the issue of whether the victim impact statement was properly before the sentencing jury, the trial court was following the provisions of law outlined in Article 41, section 4-609(d) and Article 27, section 413(c). This Court has also addressed the constitutional issues associated with the use of the victim impact statement extensively in issue "I" of this opinion. This Court finds that Petitioner's argument is without merit and should be dismissed.

XII. RETRIAL OF PETITIONER ON ISSUE OF DEATH PENALTY IS NOT BARRED ON DOUBLE JEOPARDY GROUNDS

It appears that Petitioner's allegations of double jeopardy are misplaced at this stage of the proceedings. While this Court has determined that Petitioner is entitled to be resentenced, to make a double jeopardy argument now presupposes the actions of all the parties following the filing of this opinion. Nonetheless, as the issue has been raised, the Court will address its contentions.

Petitioner's argument seems to track the cases that reflect the issue of "implied acquittal". More specifically Petitioner is suggesting that the State failed to produce sufficient evidence of the existence of the aggravating circumstances at his trial, and is therefore collaterally estopped from seeking the death penalty on retrial or resentencing.

Petitioner submits as authority for his position the cases of *Bullington v. Missouri*, 451 U.S. 430 (1981), and *Burks v. U.S.*, 437 U.S. 1 (1978). In *Bullington*, a Missouri jury initially convicted the defendant of murder arising out of the abduction of a young woman. At a separate sentencing hearing the defendant was sentenced to life imprisonment. Subsequent to his conviction the United States Supreme Court ruled that a provision of Missouri law dealing with jury selection and exemptions was unconstitutional. Thereafter, the trial court granted Bullington's motion for a new trial based on unconstitutionality of the Missouri jury selection and exemption.

At the retrial the State notified defendant of its intention to seek the death penalty. Defendant objected on double jeopardy grounds. Justice Blackmun, writing for the majority in *Bullington*, reiterated the well established rule "that there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction." *Id.* at 437-38. Justice Blackmun also pointed out,

relying on *Burks v. U.S.*, 437 U.S. 1 (1978)[9]: "[a] defendant may not be retried if he obtains a reversal of his conviction *on the ground that the evidence was insufficient* to convict." *Bullington*, 451 U.S. at 442.

The Court, however, ultimately upheld Bullington's double jeopardy argument in Bullington's case based solely on the facts of his case and the doctrine of implied acquittal. The Court observed:

> that the sentence of life imprisonment which petitioner received at his first trial meant that the jury has already acquitted the defendant of whatever was necessary to impose the death sentence. A verdict of acquittal on the issue of guilt or innocence is of course absolutely final. The values that underlie this principle, stated for the Court by Justice Black are equally applicable when a jury has rejected the State's claim that the defendant deserves to die.

Bullington v. Missouri, 451 U.S. 430, 445 (1981).

It is clear in the present case that neither *Bullington* nor *Burks* are applicable to Petitioner because (1) the aggravating circumstance upon which the State based its request for the death penalty was proven to the satisfaction of the sentencing jury whose verdict was in fact the death penalty; therefore there is no issue regarding insufficiency of evidence, and (2) while the Court has heretofore reached the conclusion that the Petitioner is entitled to a new sentencing, the State is barred only from seeking a sentence more severe than that which was originally sought by the State and ultimately imposed by the sentencing jury. The State is not barred from seeking a penalty

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[9] In *Burks*, the Court, in holding that the Double Jeopardy Clause barred retrial, did not distinguish between the defendant who is acquitted at trial and the defendant whose conviction is reversed by an appellate court because the evidence was insufficient to support the verdict. *Burks v. U.S.*, 437 U.S. 1 (1978).

equal to that imposed by the jury. Petitioner's case, therefore, does not involve the doctrine of implied acquittal.

Furthermore, in *Poland v. Arizona*, 476 U.S. 147 (1986), the United States Supreme Court held that so long as the evidence at trial and sentencing was sufficient to convict the defendant and impose the death sentence, the trial court may, on remand, reimpose the death penalty.

There is nothing in the law that persuades this Court that Petitioner's double jeopardy argument has merit.

XIII. PETITIONER WAS NOT DENIED HIS RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER EITHER THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF MARYLAND

Petitioner is alleging that raw statistics will show that only the wealthier counties were prosecuting capital cases at the time he was prosecuted in Somerset County by the State's Attorney for Baltimore County's office. Persons from wealthier counties were, therefore, more likely to be subjected to capital punishment then persons in poorer counties. Consequently, he contends, the prosecution of capital cases was and is currently done in a discriminatory manner, thus violating the Equal Protection Clause of the United States Constitution and the Maryland Declaration of Rights.

The only support for Petitioner's argument is a speech given to the legislature by the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland.[10] In this speech, Judge Murphy addressed the expense involved in the prosecution of capital cases and how it may be a factor in determining whether or not to seek the death penalty.

In *Calhoun v. State*, 297 Md. 563, 468 A.2d 45 (1983), the Court of Appeals of Maryland addressed the issue of

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[10] State of the Judiciary address delivered to the Maryland General Assembly on January 22, 1991.

whether Maryland's death penalty constituted an equal protection violation. The defendant in *Calhoun* was convicted of first degree murder and various other crimes. On appeal, the defendant alleged that Article 27, section 412(b) lacked specific standards for imposing the death penalty, thereby giving the prosecutor "unbridled exercise of discretion" in seeking the death penalty. *Id.* at 602, 468 A.2d at 63. This discretion was alleged to have resulted in prosecutors applying the death penalty statute in an inconsistent and discriminatory manner in violation of the Eighth and Fourteenth Amendments and the Maryland Declaration of Rights.

The *Calhoun* court analyzed the equal protection issue under the United States Supreme Court's ruling in *Gregg v. Georgia*, 428 U.S. 153 (1976). The *Gregg* Court held that "[a]bsent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." 428 U.S. at 225. Based on the holding of *Gregg*, the Court of Appeals of Maryland in *Calhoun* held: "[a]bsent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, the claim cannot stand." 297 Md. at 605, 468 A.3d at 64.

Assuming *arguendo* that the Petitioner could produce convincing evidence of an inconsistent exercise of discretion among prosecutors in this State, the Petitioner's argument would still fail. The Court of Appeals of Maryland in *Calhoun* held that to the extent that there is a difference in the practice of the various State's Attorneys around the state, the mandatory proportionality review component of Article 27, section 414(e) assures that a sentence of death is not imposed in a disproportionate manner. *Id.* at 605, 468 A.2d 64. The proportional review mandated by Article 27, section 414(e), which was conducted by the

Court of Appeals in this case, has cured whatever merit the Petitioner's complaint may have had.

Furthermore, Petitioner's equal protection claim is not a sufficient basis for post conviction relief because it is unsupported by any facts or law. In *Dodson v. Warden*, 8 Md. App. 593, 261 A.2d 195 (1970), the Petitioner filed application for leave to appeal from an order denying his third petition for relief under the Post Conviction Procedure Act, contending that he was deprived of his Fourteenth Amendment rights. The *Dodson* court held that the allegation was unsupported by any facts in the record, and the contention was merely a bald allegation and must be dismissed. *Id.* at 594, 261 A.2d at 196.

Petitioner's claim must be dismissed because it is a bald allegation unsupported by any evidence of indiscretion by prosecutors in the State of Maryland that has resulted in the irrational, inconsistent, or discriminatory application of the death penalty.

XIV. PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL OR APPELLATE LEVEL

Petitioner, in choosing to represent himself, waived his right to counsel before the Circuit Court for Baltimore County and the Circuit Court of Somerset County. However, the trial judge, Honorable Lloyd L. Simpkins, appointed standby counsel for Petitioner. Petitioner now alleges that standby counsel's assistance was ineffective because an issue as to whether or not a machine gun could fit the requisite description of a handgun was not litigated or preserved for appeal by standby counsel.

The Fifth and Fourteenth Amendments and Article 21 of the Maryland Declaration of Rights guarantees to criminal defendants the right to effective assistance of counsel. In order to prove that standby counsel's assistance was ineffective, Petitioner must satisfy the two-prong test setforth in *Strickland v. Washington*, 466 U.S 668 (1984),

which was adopted by the Court of Appeals of Maryland in *Harris v. State*, 303 Md. 685, 496 A.2d 1074 (1985).

The *Strickland* test requires that the Petitioner show (1) that his attorney's performance was deficient and (2) that the deficient performance prejudiced the defense. Petitioner must satisfy both prongs of the test in order to prove his claim. Under this test, the Petitioner must prove, in light of all circumstances, that counsel's representation fell below an objective standard of reasonableness which prejudiced his defense. *Id.* at 698, 496 A.2d 1080. This Court finds for the following reasons that standby counsel's actions were not constitutionally deficient.

First, the only specific incident to which Petitioner is alleging counsel's assistance was ineffective was during the testimony at trial of F.B.I. Agent Robert Seibert regarding the description of the alleged weapon. Agent Robert Seibert referred to the alleged weapon "as a MAC-11 pistol or machine gun." On several occasions standby counsel did object to the testimony of Agent Robert Seibert regarding the description of the MAC-11 (Tr. 1948-1949). Second, evidence of counsel's reasonableness in not contesting whether the MAC 11 fit the requisite description of a handgun is found in *Moore v. State*, 84 Md. App. 165, 578 A.2d. 304 (1990). In *Moore*, the court held that an Ingram/Cobray Model #10/11 (MAC 11) was a handgun within the meaning of Article 27, section 36B. *Id.* at 175, 578 A.2d at 309. The court in *Moore* found the following physical characteristics to be true of the MAC 11:

(1) it could be concealed under a loose fitting coat, thus the gun may be concealed on the person,

(2) it fires 1200 rounds per minute and

(3) fully loaded weights 4.87 pounds.

Id. at 174, 578 A.2d at 308.

In Petitioner's case, Agent Robert Seibert testified that the weapon used in this case "would be a MAC-11 pistol or its fully automatic version, the machine pistol . . . [which] automatic version fires 1200 rounds a minute." (Tr. 1948-1949). In addition, the State proved that the gun was capable of concealment on the person. Assuming *arguendo* that the weapon used was the fully automatic version of the MAC 11, the Court of Appeals of Maryland has held it is still considered to be a handgun.

The *Moore* case may not be dispositive of the issue as to whether the MAC 11 in Petitioner's case was in fact a handgun, but it is directly related to the issue of counsel's reasonableness in believing that "in light of all the circumstances" the State had proven the required elements of a handgun. Petitioner has failed to prove that standby counsel's performance was deficient, and therefore has failed to satisfy either prong of the *Strickland* test. Accordingly, his claim of ineffective assistance of counsel at the trial level must be dismissed.

Similarly, Petitioner asserts that he was denied effective assistance of counsel at the appellate level. Petitioner alleges that appellate counsel should have raised on appeal the issue regarding whether the State proved the elements of a handgun. In *Smith v. Murray*, 477 U.S. 527 (1986), the Court held that *Strickland*'s two-prong test is applicable to appellate courts. Therefore under the *Strickland* test and in light of the holding in the *Moore* case, appellate counsel did not act unreasonably in not raising the MAC-11 issue on appeal. The Petitioner has failed to prove that appellate counsel's performance was deficient and prejudicial. Petitioner's claim of ineffective assistance of counsel at the appellate level must also be dismissed.

The Court also notes that at various times during the pending of these proceedings, Petitioner has advanced the argument that he is not properly before this Court on post conviction because he is in federal custody and not subject

to the jurisdiction of the courts of the State of Maryland. This Court is not persuaded by Petitioner's arguments.

It is thereupon, this 31st day of July, 1992, by the Circuit Court for Somerset County, Maryland

ORDERED that the petitioner be, and he is hereby GRANTED a new sentencing; and it is further

ORDERED that the Clerk of this Court set this matter in for a new sentencing; and it is further ORDERED that all other relief prayed for by Petitioner be, and the same is hereby DENIED.

/s/ Daniel M. Long
Daniel M. Long, Judge

APPENDIX B

ANTHONY GRANDISON	• IN THE
	• COURT OF APPEALS
v.	• OF MARYLAND
	• Misc. No. 29
STATE OF MARYLAND	• September Term 1992

O R D E R

The Court having considered the two applications for leave to appeal, one filed by Anthony Grandison and one filed by the State, in the above entitled case, it is this 23rd day of October, 1992.

ORDERED, by the Court of Appeals of Maryland, that the applications be, and they are hereby, denied.

/s/ Robert C. Murphy
Chief Judge

Supreme Court, U.S.
FILED
FEB 5 1993
OFFICE OF THE CLERK

No. 92-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MARYLAND,

Petitioner,

v.

ANTHONY GRANDISON, SR.,

Respondent.

On Petition For A Writ of Certiorari To The Circuit Court for Somerset County, Maryland

SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1207

STATE OF MARYLAND,

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Respondent.

On Petition For A Writ of Certiorari
To The Circuit Court for Somerset County, Maryland

SUPPLEMENTAL BRIEF

Petitioner, the State of Maryland, pursuant to Supreme Court Rule 15.7, hereby supplements the Petition for a Writ of Certiorari filed in this Court on January 15, 1993.

ARGUMENT

The State of Maryland's petition for a writ of certiorari presents the question whether rules intended merely to facilitate a capital sentencing jury's consideration of mitigating factors fall within the "watershed rules of criminal procedure" exception to the non-retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989). This issue arises out of the state

post conviction court's having vacated Respondent Anthony Grandison, Sr.'s death sentence on the ground that the capital sentencing form and instructions were indistinguishable from those held unconstitutional in *Mills v. Maryland*, 486 U.S. 367 (1988). Notwithstanding that Grandison's death sentence had become final two years prior to *Mills*, the court held that Grandison was entitled to retroactive application of that decision on the theory that *Mills* had established a watershed rule of criminal procedure.

Ten days after the filing of the State's petition challenging that ruling, this Court decided *Graham v. Collins*, 61 U.S.L.W. 4127 (No. 91-7580) (U.S. January 25, 1993). There, the Court held that *Teague*'s watershed rule exception did not apply to Graham's claim, made in reliance upon *Penry v. Lynaugh*, 492 U.S. 302 (1989), that the capital sentencing scheme employed in his case prevented the jury from giving effect to mitigating evidence of youth, family background, and positive character traits. 61 U.S.L.W. at 4132. In so holding, the Court, as it has done in the past, alluded to the fact that this second *Teague* exception has not been fully delineated: "*Whatever the precise scope of this exception*, it is clearly meant to apply only to a small core of rules. . . ." *Id.* (emphasis added). *Graham* thus provides further support for Petitioner's contention that explication of this exception is warranted.

In addition, *Graham* itself is virtually dispositive of the merits of the present case. The Court's holding that *Penry* did not establish a watershed rule *a fortiori* applies to *Mills* error, which likewise implicates a sentencing jury's consideration of mitigating factors. As such, if the Court were not inclined to grant

plenary review, the decision below should be summarily vacated and remanded in light of *Graham*.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, the State of Maryland respectfully requests that the Court issue a writ of certiorari and reverse the judgment of the Circuit Court for Somerset County, Maryland. Alternatively, the State of Maryland requests that the Court grant the writ and summarily vacate and remand in light of *Graham v. Collins*.

Respectfully submitted,

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February 5, 1993

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No. 92-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MARYLAND,

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Respondent.

On Petition for Writ of Certiorari to the Circuit Court for Somerset County, Maryland

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MARYLAND,

Petitioner,

vs.

ANTHONY GRANDISON, SR.,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

Collateral attacks on final judgments based on subsequent changes in the law are fundamentally unfair to the people for the same reason that *ex post facto* laws are unfair to individuals. Allowing such attacks in the absence of a substantial risk of an actual miscarriage of

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1. CJLF has received written consent from both parties to file this brief.

justice is contrary to the interests CJLF was formed to advance.

SUMMARY OF ARGUMENT

Teague v. *Lane* was a major reform in the law of habeas corpus. It protected the people against unfair *ex post facto* abrogation of judgments which were legal when entered, subject to two narrow exceptions. To preserve the vitality of this reform, the exceptions must be kept narrow.

The second exception has caused confusion in the lower courts, and better guidance is needed. That guidance can be found in the strong connection between this exception and the "actual innocence" exception of *Murray* v. *Carrier*. Just as *Sawyer* v. *Whitley* eliminated from the *Murray* exception all cases where the defendant is guilty and eligible for the death penalty, so should all rules dealing only with the sentencing of death-eligible defendants be excluded from the second *Teague* exception.

ARGUMENT

I. The second *Teague* exception is the subject of great confusion in the lower courts.

A. The Teague Decision.

Teague v. *Lane*, 489 U. S. 288 (1989) was a landmark decision, taking a giant step toward restoring balance and fairness to the criminal law. The effectiveness of that reform, however, depends on its proper implementation. Decisions such as the one in the present case threaten to nullify *Teague*.

The American legal tradition has long recognized that it is fundamentally unfair to declare an act illegal when it was understood to be legal at the time it was done. Criminal statutes having such an effect are expressly

prohibited by the Constitution, on both the federal and state levels. U. S. Const. art. I, § 9, cl. 3; *id.*, § 10, cl. 1. Retroactive expansion of criminal statutory prohibitions by judicial interpretation has long been recognized as so fundamentally unfair as to violate due process of law. See *Bouie* v. *City of Columbia*, 378 U. S. 347, 353-354 (1964).

Teague extends this basic principle of fairness to the people. The question on habeas corpus is not whether the trial court erred but whether the state is violating the Constitution by keeping the prisoner in prison. 28 U. S. C. § 2254(a). If the state obeyed the law in effect when it entered the judgment, it is fundamentally unfair to the people to declare their judgment illegal merely because the rules have since changed. See *Engle* v. *Isaac*, 456 U. S. 107, 128-129, n. 33 (1982).

Teague recognizes, however, that there may be circumstances where a judgment legal when entered must be declared illegal because of an overriding imperative on the other side. Thus, there are two *narrow* exceptions to the rule. See *Saffle* v. *Parks*, 494 U. S. 484, 487-488 (1990). The question in this case is whether the second exception will continue to be narrow, or whether it will swallow the rule.

B. Exceptions and Innocence.

Throughout the recent development of habeas corpus law, this Court has sounded two themes. First, the Court has placed limits on the writ in order to partially return to the old rule that habeas will not be used as a substitute for or repetition of the appeal. See *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). To this end, limits have been placed on consideration of constitutional claims irrelevant to the accuracy of the result, *Stone* v. *Powell*, 428 U. S. 465 (1976); claims not timely raised in state court, *Engle* v. *Isaac*, *supra*, 456 U. S., at 481-482; claims not raised in the first federal petition, *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); and attempts to relitigate

claims in a successive petition, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) (plurality). At the same time, the Court has increasingly recognized the overriding imperative to correct actual miscarriages of justice, i.e., the convictions of people who are actually innocent. *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986).

Teague itself explicitly recognizes these common threads. In defining the problem as one of the scope of the writ, *Teague* relies on *Engle*, *Murray*, *Kuhlmann*, and *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). *Teague*, 489 U. S., at 308. Similarly, in setting out the exceptions, *Teague* noted that "our cases have moved in the direction of reaffirming the relevance of the *likely accuracy of convictions* in determining the available scope of habeas review," citing *Kuhlmann* and *Murray*. *Id*., at 313 (emphasis added). *Sawyer* v. *Smith*, 497 U. S. 227, 245 (1990) ("*Sawyer I*") similarly relied on procedural default/miscarriage of justice cases in its discussion of the second *Teague* exception.

From the very beginning, then, there has been a powerful connection between the *Teague* exceptions and the "actual innocence" exception of *Murray* and *Kuhlmann*. For the first *Teague* exception, the connection is simple and obvious. A person in jail for flag burning, 18 U. S. C. § 700, would be actually innocent. See *United States* v. *Eichman*, 496 U. S. 310 (1990). A person sentenced to death for rape would be "innocent of" (i.e., ineligible for) the death penalty. *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). This straightforward rule has caused little difficulty in the lower courts, with one appalling exception. See *Beam* v. *Paskett*, 966 F. 2d 1563 (CA9 1992), cert. pending, (No. 92-464) (finding exception applicable to sane adult convicted of rape and murder of a 13-year-old girl).

The second exception, however, has created more problems. Like the first exception, it is rooted in the need to prevent an actual miscarriage of justice, defined

as the conviction of an innocent person. *Teague*, 489 U. S., at 313. Unlike the first exception, however, "the precise contours of this exception" have proven "difficult to discern." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

Misunderstanding of the second *Teague* exception is rampant in the courts of appeals. *Graham* v. *Hoke*, 946 F. 2d 982 (CA2 1991), cert. denied, 116 L. Ed. 2d 793, 112 S. Ct. 890 (1992) is a prime example. *Graham* held, in effect, that *any* rule which supplanted a prior rule "altered our understanding of a 'bedrock procedural element.' " *Id.*, at 994. As long as it has some accuracy-enhancing effect, it would qualify for the second exception. The "narrow" exception would therefore encompass virtually all new rules thought to enhance accuracy, and *Teague* would be a dead letter.

Graham was nonetheless decided in the state's favor under harmless error analysis. 946 F. 2d, at 997. How a violation of a rule which is an "absolute prerequisite to fundamental fairness," *Teague*, 489 U. S., at 314, can ever be harmless error is not explained.

Hopkinson v. *Shillinger*, 888 F. 2d 1286 (CA10 1988) is similar. The Court of Appeals in that case held that the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) qualified for the second exception and then proceeded to find the error did not affect the jury in that case. 888 F. 2d, at 1292, 1295. The former holding was abrogated by *Sawyer* v. *Smith*, *supra*.

The present case is both an example of the confusion and an opportunity to correct it. The court below[2] relied primarily upon *Williams* v. *Dixon*, 961 F. 2d 448 (CA4

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2. The fact that this is a state habeas corpus case does not prevent application of *Teague*. Where a state makes collateral relief available for a federal claim, retroactivity is a federal question. See *Yates* v. *Aiken*, 484 U. S. 211, 217, 218 (1988).

1992), cert. denied, 121 L. Ed. 2d 445 (1992).[3] See Pet. App., 17-18. *Williams* quoted *Sawyer* v. *Smith* out of context and announced a rule that *all* of this Court's Eighth Amendment capital sentencing rules meet the accuracy-enhancing requirement for the second *Teague* exception. 961 F. 2d, at 454. *Williams* then launched into a "death is different" dissertation which, if accepted, would effectively abrogate *Penry* v. *Lynaugh*, *supra*, and apply the second *Teague* exception to all penalty phase rules, something this Court explicitly refused to do in *Sawyer I*, 497 U. S., at 227. The court below in the present case simply accepted this misinterpretation of *Teague*.

To clear up this confusion, *amicus* submits, the contours of the exception need to be more precisely defined. A statement that a rule "has none of the primacy and centrality of the rule adopted in *Gideon*," *Saffle*, *supra*, 494 U. S., at 495, provides insufficient guidance for lower courts. The proper guidance, *amicus* submits, can be found in recognition of the link between the *Teague* exceptions and the "actual innocence" rule of *Murray* v. *Carrier*.

II. Only rules essential to the prevention of miscarriages of justice qualify for the second exception.

Teague v. *Lane*, 489 U. S. 288 (1989) did not accept at face value Justice Harlan's assertion in *Desist* v. *United States*, 394 U. S. 244, 262 (1969) (dissent) that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." Instead, *Teague* raised the threshold, "limiting the scope of the second exception to those new

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3. The present case is a better case for addressing *Teague* than *Williams* because, unlike *Williams*, in the present case there is no argument that the state waived *Teague*. Cf. *Williams*, *supra*, 961 F. 2d, at 456-459.

procedures without which the likelihood of an accurate conviction is *seriously* diminished." *Id.*, at 313 (emphasis added). This limitation is fully consistent with *Teague*'s concern for preventing miscarriages of justice. If it is unlikely that trials conducted before the rule resulted in the conviction of innocent people, then the state's interest in finality outweighs the benefits, if any, of applying the rule to overturn final judgments.

The conclusion which immediately follows is inevitable. In the last decade of the twentieth century, there are few, *if any*, such rules remaining to be made. "Because we operate from the premise that such procedures would be so *central* to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." *Ibid.* (emphasis added). This is a very cautious understatement. The firestorm that swept through criminal procedure in the 1960's and 1970's left behind very little combustible material. We now have a system so heavily weighted in defendants' favor that there are no rules of such magnitude remaining to be made.

Gideon v. *Wainwright*, 372 U. S. 335 (1963) has been cited repeatedly as an example of the kind of rule which qualifies for the exception. *Teague*, *supra*, 489 U. S., at 311-312 (quoting *Mackey* v. *United States*, 401 U. S. 667, 693-694 (1971) (Harlan, J., concurring in the judgment)); *Saffle*, *supra*, 494 U. S., at 495. The reason is simple. Denial of counsel in the pre-*Gideon* era resulted in the conviction of many innocent people, including Gideon himself, who was acquitted on retrial. See A. Lewis, *Gideon's Trumpet* 237 (1964). Extension of the right to counsel to all felony defendants sharply reduced the number of fundamental miscarriages of justice. The procedural requirements promulgated under the Eighth Amendment are entirely different.

In *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) ("*Sawyer II*"), this Court was confronted with

the question of when a death sentence is a "miscarriage of justice" despite the facts that the defendant is actually guilty of murder, is actually eligible under state law, and is not within any of the categorical constitutional exclusions.[4] The majority said never; the concurrence said almost never. The majority held that "the 'actual innocence' requirement must focus on those elements which render a defendant eligible for the death penalty . . . ." 120 L. Ed. 2d, at 585, 112 S. Ct., at 2523. The concurrence would also include those cases where *no* reasonable sentencer would have imposed the death penalty. *Id.*, at 120 L. Ed. 2d, at 301, 112 S. Ct., at 2536 (citing *Jackson* v. *Virginia*, 443 U. S. 307, 316-318 (1979)).

Of all the *procedural* rules promulgated under the Eighth Amendment after *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases,[5] which ones constitute rules the nonobservance of which is *highly likely* to result in a miscarriage of justice? The answer, *amicus* submits, is *none*. The categorical exclusion rules, which qualify for the first exception under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) take care of all of the ineligibility cases which the *Sawyer II* majority considered to be miscarriages of justice. Even if one accepts the view of the *Sawyer II* concurrence, that a miscarriage of justice would be possible despite eligibility, such a case must be extremely rare. Thus, Sandra Lockett would now be excluded by the rule of *Enmund*, *supra*. See *Lockett* v. *Ohio*, 438 U. S. 586, 589-591 (1978). None of this Court's other Eighth Amendment procedure cases presents facts on which *no* reason-

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4. See *Enmund* v. *Florida*, 458 U. S. 782 (1982) (felony murder accomplice with no intent to kill); *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape, not murder); *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (insane at time of execution); *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (under sixteen years old, no statutory minimum age).

5. We need not consider here categorical exclusions, which qualify under *Penry*, or the retroactivity of *Gregg* and its companion cases, which is a moot question.

able sentencer could find death to be the appropriate penalty, and indeed it is highly questionable whether *Lockett* is that clear.

At best, all of the post-*Gregg* procedural cases fit *Sawyer I*'s description of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). They are protections of some value and are thought to enhance accuracy of capital proceedings. *Sawyer I*, *supra*, 497 U. S., at 244. However, they are layered on top of a foundation of due process protections which apply to capital and noncapital cases alike. They are also layered on top of the basic structure of *Gregg*, *Furman* v. *Georgia*, 408 U. S. 238 (1972), and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), which established the basic system of guided discretion we have today.

Enhancing the accuracy of a trial is not enough to qualify a rule for the second exception. A rule must also be a "watershed rule[ ] of criminal procedure, ..." *Teague*, *supra*, 489 U. S., at 311. In addition to *Gideon*, *Teague* alluded to three other cases that would have satisfied the second exception: *Brown* v. *Mississippi*, 297 U. S. 278 (1936) (beating a confession out of the defendant); *Moore* v. *Dempsey*, 261 U. S. 86 (1923) (mob dominated trial); and *Mooney* v. *Holohan*, 294 U. S. 103 (1935) (knowing use of perjured testimony by the prosecution). See *Teague*, *supra*, 489 U. S., at 313; *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting). In each of the cases mentioned by *Teague*, this Court unanimously supported the announced right. *Brown* and *Mooney* were unanimous decisions, while in *Gideon* the three concurrences accepted its extension of the right to appointed counsel. See 372 U. S., at 345 (Douglas, J., concurring); 372 U. S., at 349 (Clark, J., concurring); 372 U. S., at 352 (Harlan, J., concurring).[6] Although two

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6. Although *Gideon* overruled *Betts* v. *Brady*, 316 U. S. 455 (1942), the *Gideon* Court did not see itself as making a new path in the law when it disregarded *Betts*, but instead was "returning to . . . old precedents." 372 U. S., at 344.

justices dissented in *Moore*, they did not dissent on the unconstitutionality of mob dominated trials, see 261 U. S., at 96 (McReynolds, J., dissenting), but instead dissented on the scope of habeas corpus, see *id.*, at 93.

This stands in sharp contrast to this Court's death penalty jurisprudence. Its entry into Eighth Amendment death penalty law sparked deep divisions within the Court. *Furman* was a 5-4 decision that mustered a majority only for the barest *per curiam* opinion. The bulk of the opinion was the many separate concurrences and dissents.

The divisiveness over capital punishment continues. There has been substantial disagreement within this Court in most of these decisions. There is even tension between the two main lines of death penalty jurisprudence. Several justices have noted the tension between the guided discretion requirement derived from *Furman* and the mitigating evidence line derived from *Lockett* v. *Ohio*, 438 U. S. 586 (1978). See *Graham* v. *Collins*, 64 U. S. L. W. 4127, 4135 (Jan. 25, 1993) (No. 91-7580) (Thomas J., concurring); *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 535, 110 S. Ct. 3047, 3062-3063 (1990) (Scalia, J., concurring); *McCleskey* v. *Kemp*, 481 U. S. 279, 363 (1987) (Blackmun, J., dissenting); *Lockett*, *supra*, 438 U. S., at 622, 623 (White, J., concurring and dissenting). A branch of law born in such controversy cannot be part of the "small core of rules . . . ' "implicit in the concept of ordered liberty." ' " *Graham*, *supra*, 64 U. S. L. W., at 4132 (quoting *Teague*, *supra*, 489 U. S., at 311 (in turn quoting *Mackey*, *supra*, 401 U. S., at 693 (Harlan, J., concurring in part and dissenting in part) (in turn quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)))).

None of the post-*Gregg* procedural rules are "watershed rules of criminal procedure." See *Teague*, 489 U. S., at 311. None are "central to an accurate determination of innocence or guilt." See *id.*, at 313. None are essential to "the fundamental fairness that must underlie a

conviction or seriously diminish the likelihood of obtaining an accurate conviction. . . ." *Id.*, at 315.

This Court has examined three capital procedure claims under the second exception. Each time it has found that the claim did not come within the second exception. See *Graham*, *supra*, 61 U. S. L. W., at 4132; *Saffle*, *supra*, 494 U. S., at 495; *Sawyer I*, *supra*, 497 U. S., at 244-245. Given the confusion in the federal courts over the second exception, it is time to recognize that none of these cases will satisfy this test.

III. The *Mills* rule is not essential to prevent miscarriages of justice.

The critical question is whether the rule of *Mills* v. *Maryland*, 486 U. S. 367 (1988) is an "absolute prerequisite to fundamental fairness." *Teague* v. *Lane*, 489 U. S. 288, 314 (1989). Is the *Mills* rule "so central to an accurate determination of innocence or guilt" that under the earlier Maryland practice "the likelihood of an accurate conviction [was] seriously diminished"? *Id.*, at 313.

Translating "actual innocence" into the penalty phase as the *Sawyer II* majority did, the answer is simply and clearly no. Once a defendant has been found guilty of murder and eligible for a death sentence, the propriety of that sentence is a matter of opinion, and its imposition is never a miscarriage of justice.

Using the *Sawyer II* concurrence's approach requires a bit more analysis, but it yields the same result. The *Mills* majority was concerned that the unanimity requirement would allow one holdout juror to prevent the others from giving effect to mitigating evidence and thus improperly impose the death penalty. 486 U. S., at 384. How likely is this scenario in a case where "in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that *no reasonable sentencer*

would have imposed the death penalty"? See *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 301, 112 S. Ct. 2514, 2536 (1992) (Stevens, J., concurring in the judgment) (emphasis added). How likely is such a verdict, so clearly contrary to the evidence, to survive review in the normal course of state procedure, including a review of whether the evidence supports the death sentence by the state high court? See Md. Code Ann. art. 27, § 414(e)(3) (Michie Supp. 1992). That possibility, *amicus* submits, is far too tenuous to justify the fundamental unfairness to the people of an *ex post facto* application of *Mills* to judgments already final.

A writ of certiorari is needed in this case to establish a categorical rule that *none* of the post-*Gregg* fine tuning of capital sentencing procedure qualifies for the second *Teague* exception. This bright line rule would make explicit what is already implicit in the *Teague* cases. All that remains is for this Court to draw the line.

CONCLUSION

A writ of certiorari should be granted.

February, 1993

Respectfully submitted,

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No. 92-1207

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STATE OF MARYLAND,

Petitioner,

v.

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Respondent.

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QUESTION PRESENTED

I. Whether the new rule of *Mills v. Maryland*, 486 U.S. 367 (1988), satisfies the second exception to the *Teague* doctrine and may therefore be applied retroactively on collateral review.

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INTEREST OF *AMICI*

In *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court recognized the limited role of federal habeas review by establishing a general principle barring the retroactive application of new rules on collateral review. This holding reflects the criminal justice interests in finality and comity and the validation of reasonable, good-faith state court determinations.

This case presents an important question concerning the availability and application of the *Teague* doctrine. The central issue concerns the scope of the second exception to the *Teague* doctrine and whether that exception may swallow the general principle established by *Teague*. *Amici* States have a substantial interest in protecting presumptively valid and final state court convictions and sentences from collateral attack on the basis of new rules which were unavailable at the conclusion of the direct review process.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

A federal indictment charged respondent Anthony Grandison, Sr., with narcotics violations. While Grandison was incarcerated pending the federal trial, he hired Vernon Evans, Jr., to kill two witnesses who were to testify for the government. On April 28, 1983, Evans shot and killed one witness and the sister of the other, mistakenly believing her to be one of the government witnesses.

On June 30, 1983, the State of Maryland charged Grandison with the murders, and subsequently notified him of its intention to seek the death penalty on those charges. Additionally, the United States had charged Grandison with federal witness tampering and criminally violating the federal civil rights of the witness. While the State murder charges were pending trial, Grandison was convicted in federal court on the original narcotics charges and the subsequent witness-related charges and sentenced to twenty-one years on the narcotics charges

and life imprisonment plus ten years. In state court on June 6, 1984, Grandison, *inter alia*, was convicted and sentenced to death on two murder counts. The Court of Appeals of Maryland affirmed the state convictions and sentences. *See Grandison v. State*, 305 Md. 685, 773, 506 A.2d 580, 624 (1986).

The direct review process was concluded on October 6, 1986, when this Court denied Grandison's petition for writ of certiorari. *See Grandison v. Maryland*, 479 U.S. 873 (1986). Subsequently, this Court struck down a requirement that a jury must first *unanimously* find the existence of a mitigating factor before it could consider the specific mitigating evidence in issue. *Mills v. Maryland*, 486 U.S. 367 (1988).

In a state post-conviction proceeding, Grandison argued that *Mills* error required reversal of his death sentences. The Circuit Court for Somerset County, Maryland agreed. The state court found that although *Mills* constituted a "new rule," within the meaning of the *Teague* doctrine, *Mills* should be retroactively applied under the second exception to the *Teague* doctrine. *Maryland v. Grandison*, No. 4010, slip op. at 16-19 (Somerset County Circuit Court July 31, 1992), *reprinted in* App. to Pet. for Cert., at 15a-16a. This holding was directly premised upon *Williams v. Dixon*, 961 F.2d 448, 454-56 (4th Cir.), *cert. denied*, 113 S.Ct. 510 (1992), which held that *Mills* satisfies the second *Teague* exception. The Court of Appeals of Maryland denied the State's application and Grandison's cross-application for leave to appeal on other grounds. *See* App. to Pet. for Cert., at 45a. Maryland now seeks review by this Court.

REASONS THE WRIT SHOULD ISSUE

I. The Broad Application of the Second Exception Threatens to Undermine the *Teague* Doctrine, Disrupting the Important Federalism and Criminal Justice Interests in Finality, Predictability, and Comity

a. Introduction: The Vital Role of the *Teague* Doctrine

The *Teague* doctrine establishes a fundamental general principle: On collateral review, a petitioner may not obtain the retroactive application or announcement of "new rules" (i.e., rules which are not dictated by prior precedent or which break new ground or impose a new obligation on the States). This doctrine advances the federalism and criminal justice interests in finality, predictability, and comity by emphasizing the limited role and function of federal habeas review in our criminal justice system.[1]

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[1] *See Teague*, 489 U.S. at 306, 308, 312 (plurality opinion); *see also Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Butler v. McKellar*, 494 U.S. 407, 413 (1990).

Of course, new rules may be established during any part of the direct review process. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *see also Teague*, 489 U.S. at 304 (plurality opinion). After the direct review process the state court conviction is presumptively final and valid, *see, e.g., Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), and different criminal justice interests are implicated by the question of retroactive application of new rules. As Justice Harlan first noted, and this Court has reiterated on several occasions, "The relevant frame of reference [on the retroactivity question] is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the *purposes for which the writ of habeas corpus is made available.*" *Mackey v. United States*, 401 U.S. 667, 682 (1971) (emphasis added) (Harlan, J., concurring in part and dissenting in part) (quoted in *Sawyer v. Smith*,

Significantly, the *Teague* doctrine does not create an *absolute* bar against the retroactive application of new rules on collateral review. The general principle established by the *Teague* doctrine may be overcome when the new rule falls within one of two "narrow" exceptions.[2] These exceptions allow for the retroactive application of new rules under the narrow circumstances when it may be warranted. However, when either of the two exceptions applies, all of the principles advanced by the *Teague* doctrine are disrupted, including the criminal justice interests in finality, comity, and predictability,[3] and the validation of reasonable, good-faith determinations of federal rights by state courts.[4] The central issue, therefore, is when, and under what showing, these identified criminal justice interests may be subjugated to other ends.

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497 U.S. 227, 239 (1990); *Butler*, 494 U.S. at 413; *Teague*, 489 U.S. at 306); *see also Saffle*, 494 U.S. at 486 (viewing the *Teague* doctrine as a "limitation on the proper exercise of habeas corpus jurisdiction").

[2] *Teague*, 489 U.S. at 310, 311-13 (plurality opinion); *see also Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367, 376 (1992); *Sawyer*, 497 U.S. at 241-42; *Butler*, 494 U.S. at 412; *Penry v. Lynaugh*, 492 U.S. 302, 313, 329 (1989).

[3] *See, e.g., Stringer*, 503 U.S. at ___, 112 S.Ct. at 1135, 117 L.Ed.2d at 377 ("The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent."); *Penry*, 492 U.S. at 314 (noting finality concerns under retroactivity doctrine); *Teague*, 489 U.S. at 308 (plurality opinion) (discussing the federalism and criminal justice interests of comity and finality).

[4] *See Butler*, 494 U.S. at 414; *see also Sawyer*, 497 U.S. at 234; *Saffle*, 494 U.S. at 488; *Teague*, 489 U.S. at 310 (plurality opinion).

This case concerns the application of the second *Teague* exception and whether this exception may effectively abrogate the general *Teague* principle against retroactive application of new rules on federal habeas review. The second *Teague* exception permits the application and announcement of new rules on collateral review which involve " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495.[5] Quite simply, if the second exception is construed broadly, then the important finality and comity interests recognized by this Court will be undermined and reasonable, good-faith state court rulings will be disregarded. The question on when the second exception to the *Teague* doctrine applies therefore challenges the integrity of the general principle.

b. The Second Exception and the Recognized "Latent Danger"

While much of the *Teague* doctrine is premised upon the retroactivity principles first advanced by Justice Harlan,[6] this Court modified Justice Harlan's proposal in

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[5] The first *Teague* exception "applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer*, 497 U.S. at 241 (citations omitted); *see also Saffle*, 494 U.S. at 494; *Penry*, 492 U.S. at 329, 330.

It is not disputed that the first exception is not applicable to this case.

[6] *See Mackey*, 401 U.S. at 681-95 (Harlan, J., concurring and dissenting); *Desist v. United States*, 394 U.S. 244, 260-65 (1969) (Harlan, J., dissenting); *see generally Teague*, 489 U.S. at 312 (plurality opinion).

order to avert "a latent danger" which would result from a second exception which was so broad it could swallow the general rule of non-retroactivity. *See Butler*, 494 U.S. at 416. Consequently, this Court limited the scope of the second exception by adopting two separate components which must first be satisfied before any new rule may be retroactively applied or announced on collateral review under the second *Teague* exception. *See, e.g., Sawyer*, 497 U.S. at 242 (noting history of and rationale for two parts to second exception).

First, the new rule must "seriously diminish the likelihood of obtaining an accurate conviction." *Teague*, 489 U.S. at 315 (plurality opinion). As Justice Harlan articulated this aspect of the exception, "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Desist*, 394 U.S. at 262 (Harlan, J., dissenting). *Second*, the new rule must also be a "watershed" rule of criminal procedure which "alter[s] our understanding of the *bedrock procedural elements*" prerequisite to the fundamental fairness of the criminal proceeding.[7] Accordingly, under the second *Teague* exception, both the accuracy element *and* the watershed rule element must be met before the criminal justice interests in finality and comity will be disturbed by the retroactive application of a new rule on collateral review. *See Sawyer*, 497 U.S. at 242.

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[7] *Teague*, 489 U.S. at 311 (plurality opinion) (emphasis in original) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part); *see also Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (referring to "those procedures that . . . are 'implicit in the concept of ordered liberty' ") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

As discussed below, the "latent danger," expressed as a mere possibility and legitimate concern by this Court in *Butler*, is becoming an actuality. The Fourth Circuit construed and applied the second *Teague* exception broadly in *Dixon*, 961 F.2d at 454-56, by holding that this Court's decision in *Mills v. Maryland* could be retroactively applied on collateral review under this exception. That decision has compelled resentencing in *Dixon*, a ten-year old capital case. Because the *Teague* doctrine applies to post-conviction proceedings in Maryland, the Circuit Court for Somerset County, Maryland in this case felt obliged to follow the Fourth Circuit rationale in *Dixon*.

The ramifications of these decisions by the Fourth Circuit and the Maryland state court may affect other similar cases involving the *Mills* decision. More important than the actual number of cases impacted by the retroactive application of *Mills* is the fact that the broad application of the second *Teague* exception in this case is indicative of a larger "latent" problem in the lower courts. Until this Court furnishes positive guidance on the type of analysis required under the second *Teague* exception, many presumptively valid and final convictions and sentences will be set aside, undermining substantial finality and comity interests.

II. The Existing Conflict Whether the New Rule of *Mills v. Maryland* May Satisfy the Second *Teague* Exception Provides An Opportunity for This Court to Furnish Guidance to the Lower Courts On the Scope of Both Aspects of the Second *Teague* Exception

a. This Case Presents An Opportunity to Clarify the Scope of the Second *Teague* Exception

The direct review process in this case was concluded on October 6, 1986. *See generally Griffith*, 479 U.S. at 321 n.6. Twenty months later, this Court decided *Mills v. Maryland*, 486 U.S. 367 (1988), striking down instructions requiring a jury to first *unanimously* find the existence of a mitigating factor before the jury could consider the mitigating evidence. Despite the presumptively valid and final conviction, on post-conviction review before the state court, respondent Grandison argued that he should nonetheless obtain the benefit of the new rule in *Mills*. The Circuit Court for Somerset County in Maryland accepted this argument by relying upon the Fourth Circuit's holding that the rule in *Mills* satisfied the second exception under the *Teague* doctrine. *See Dixon*, 961 F.2d at 454-56.

Unlike the state court below, other courts which have considered the *Mills* holding have concluded that it constitutes a new rule, within the meaning of the *Teague* doctrine, which may not be retroactively applied on collateral review.[8] If the *Mills* holding satisfies the second

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[8] *See Wilcher v. Hargett*, 978 F.2d 872, 878 (5th Cir. 1992); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992), *petition for*

exception, then this exception may swallow the general rule against applying new rules on collateral review.

In addition to resolving the present conflict on whether the *Mills* rule may be retroactively applied under the second *Teague* exception, this case also presents an opportunity for the Court to provide guidance to the lower courts on an important habeas issue. Until clarity is provided on the scope of the second *Teague* exception, the lower courts will continue to wrestle with the application of this exception, allowing for the development of new rules on collateral review.

This Court has yet to decide a case where the second *Teague* exception applies. To date, the primary example of a rule satisfying this exception is the right to representation by counsel in all criminal trials for serious offenses. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also Saffle*, 494 U.S. at 495; *Teague*, 489 U.S. at 311-12.

This Court has twice acknowledged that the specific boundaries of this exception have yet to be illuminated.[9] Further, *Teague* noted the narrowness of the second exception: "Because we operate from the premise that such

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cert. filed; see also Zettlemoyer v. Fulcomer, 923 F.2d 284, 317 n.3 (3rd Cir.) (Sloviter, J., dissenting), *cert. denied*, 112 S.Ct. 280 (1991); *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2840, *stay denied, cert. denied*, 112 S.Ct. 334 (1991); *Thomas v. Jones*, 742 F. Supp. 598, 601-02 (S.D. Ala.), *aff'd in an unpublished opinion*, ___ F.2d ___ (11th Cir.), *cert. denied, stay denied*, 497 U.S. 1042 (1990).

[9] *See Graham v. Collins*, 61 U.S.L.W. 4127, 4132 (1993) (noting "[w]hatever the precise scope of this exception"); *Saffle*, 494 U.S. at 495 ("The precise contours of this exception may be difficult to discern.").

procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many [] components of basic due process [central to an accurate determination of innocence or guilt] have yet to emerge."[10]

If, in fact, there are few remaining watershed rules affecting the fundamental fairness and accuracy of the criminal proceeding, then it is highly unlikely in the near future for guidance to come from this Court in a case involving the application of such a watershed rule of criminal procedure. Therefore, any guidance to lower courts is likely to come in a case where the second exception is *not* satisfied. Until greater guidance is provided, some lower courts will be able to undermine the finality and comity interests advanced by the *Teague* doctrine by stepping into the void created by the unarticulated contours of the second exception.

b. This Case Presents An Opportunity to Resolve the Existing Conflict Over the Scope of the Accuracy Element of the Second *Teague* Exception

The lower courts are split on the scope of the accuracy element of the second exception concerning the impact of the new rule on the likelihood of obtaining an accurate conviction. The conflict is whether "some" mere

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[10] *Teague*, 489 U.S. at 313 (plurality opinion); *see also Graham*, 61 U.S.L.W. at 4132 (noting second exception "is clearly meant to apply only to a small core of rules"); *Sawyer*, 497 U.S. at 241 (referring to the narrowness of both exceptions); *Saffle*, 494 U.S. at 488 (same).

impact on the fact-finding process is required or whether a significant or substantial impact is necessary before the accuracy element is met.

In *Williams v. Chrans*, 945 F.2d 926, 945 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 3002 (1992), the Seventh Circuit was presented with the question of whether *Batson v. Kentucky*, 476 U.S. 79 (1986) (concerning the burden of proof to determine whether the prosecutor has impermissibly used peremptory challenges to exclude veniremen on account of race), should be retroactively applied under the *Teague* doctrine. In considering the accuracy element of the second exception, the Seventh Circuit relied upon this Court's pre-*Teague* decision of *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam). One of the factors assessed by the *Allen* Court was whether retroactive application of *Batson* "is designed to enhance the accuracy of criminal trials." *Id.* (quoting *Solem v. Stumes*, 465 U.S. 638, 643 (1984)). The Seventh Circuit, in quoting *Allen* and applying the *Teague* standard, acknowledged that the new rule of *Batson* would have "some" impact on the fact-finding function, but that impact alone was insufficient. *See Chrans*, 945 F.2d at 945. Thus, at least one federal court has reasoned that the *Teague* doctrine requires more than "some" impact before the accuracy element is established. Language of the *Teague* decision supports this conclusion, suggesting that a threshold level (i.e., "serious" or "significant" impact) must be crossed before the accuracy element is satisfied by the proposed new rule.[11]

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[11] *See Teague*, 489 U.S. at 315 (plurality opinion) (noting the new rule must "*seriously* diminish the likelihood of obtaining an

In stark contrast is the liberal application of the accuracy element by the Fourth Circuit, which was completely relied upon by the state court in this case. *See Grandison*, No. 4010, slip op. at 17, *reprinted in* App. to Pet. for Cert., at 15a-16a. In *Dixon*, 961 F.2d at 454, the Fourth Circuit misquoted and misapplied this Court's opinion in *Sawyer* to conclude that the accuracy element is essentially satisfied as long as there is "some" impact by the new rule on the likelihood of obtaining a conviction. In citing to *Sawyer*, the Fourth Circuit concluded the accuracy element was "easily" met and noted that "it was because *every* Eighth Amendment case concerning capital punishment does meet the first requirement of the second *Teague* exception that the [U.S. Supreme] Court refused to adopt Sawyer's interpretation of the exception." *Dixon*, 961 F.2d at 454 (emphasis added). Thus, the Fourth Circuit concluded that the *Mills* rule satisfied the first aspect of the second exception since it was merely "aimed at increasing the accuracy of capital sentencing." *Id.* at 455.[12]

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accurate conviction") (emphasis added); *id.* at 313 ("limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is *seriously* diminished") (plurality opinion) (emphasis added); *see also Desist*, 394 U.S. at 262 (Harlan, J., dissenting) (noting "all 'new' constitutional rules which *significantly* improve the pre-existing fact-finding procedures are to be retroactively applied on habeas") (emphasis added).

[12] Other courts have also suggested that they too employ a mere impact test. *See, e.g., Adams v. Aiken*, 965 F.2d 1306, 1312 (4th Cir. 1992) (noting "[i]t is quite evident that [the] rule [in *Cage v. Louisiana*, 498 U.S. 39 (1990) concerning reasonable doubt instructions] eliminates confusion and improves the accuracy of a trial," but concluding the watershed rule element was not satisfied), *petition for cert. filed.*

Sawyer did not hold that (1) the accuracy element requires only a "mere impact" test, or (2) all new rules proposed under the Eighth Amendment automatically satisfy the accuracy element. Instead, as this Court aptly observed, "It is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner." *Sawyer*, 497 U.S. at 243. The same can be said of the liberal construction of the accuracy element by the Fourth Circuit.

Serious questions concerning the availability of the *Teague* doctrine are raised by this split of lower court authority. Is there anything left of the accuracy element if the petitioner need only show that the proposed new rule has "some" impact on the fact-finding process? At what point is the accuracy element meaningfully satisfied: Is mere enhancement of the accuracy of the trial all that is required or is some significant threshold level necessary? Will the accuracy element always be satisfied in Eighth Amendment cases, as suggested by the Fourth Circuit and the state court in this case? What "narrowness" remains of the second exception if the accuracy element can be so easily satisfied? What articulable purpose is advanced by this element if it can be met by most proposed new rules of criminal procedure? This split of authority and these questions alone warrant consideration of this case by this Court.

c. This Case Presents An Opportunity to Resolve the Present Divergence Over the Scope of the Watershed Rules Element of the Second *Teague* Exception

There is also a divergence among the lower courts over the scope of the second element of the second *Teague*

exception regarding "watershed" rules of criminal procedure.

In *Dixon*, the Fourth Circuit held that *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990), "are 'bedrock procedural elements' and are 'implicit in ordered liberty.' " *See* 961 F.2d at 456. In reaching this conclusion, the Fourth Circuit referred to the evolving standards of decency standard under the Eighth Amendment; the unique sanction of the death penalty; the requirement of individualized sentencing for the death penalty; the arbitrary and capricious nature of a unanimity requirement; and the contention that the unanimity requirement "has the same 'primacy and centrality' of *Gideon*." *Id.* at 455-56. The state court in this case was persuaded by the *Dixon* opinion. *See Grandison*, No. 4010, slip op. at 17-18, *reprinted in* App. to Pet. for Cert., at 15a-16a. It is difficult to discern many Eighth Amendment rules which would not qualify under the watershed rules element as construed by the Fourth Circuit.

In a non-capital case, a similar broad application of the watershed rules element was recently afforded by the Second Circuit in *Graham v. Hoke*, 946 F.2d 982, 994 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 890 (1992). In issue was the retroactive application of *Cruz v. New York*, 481 U.S. 186 (1987), holding that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193 (citation omitted). In an alternative holding, the Second Circuit held the second

element of the second *Teague* exception was satisfied because the constitutional right of confrontation was "implicated." *Hoke*, 946 F.2d at 994. Notwithstanding the importance of the *Cruz* holding and the Confrontation Clause, the question raised by this rationale is what other fundamental constitutional rights may similarly qualify under the watershed rule exception? These decisions are contrary to the observation in *Teague* that it is "unlikely that many [] components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313 (plurality opinion).

In contrast to these decisions, and consistent with this Court's opinions limiting the availability of the second exception, the Fifth Circuit has held that this exception is available only for those new constitutional rules "designed to redress constitutional violations that so distort the judicial process as to leave one with the impression that there had been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case." *Skelton v. Whitley*, 950 F.2d 1037, 1044-45 (5th Cir.) (citations and internal quotations omitted), *cert. denied*, 113 S.Ct. 102 (1992). This Fifth Circuit formulation is predicated on the classic examples justifying habeas review, including "that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313-14 (plurality opinion) (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted)); *see also Sawyer v. Butler*, 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), *aff'd sub. nom., Sawyer v. Smith*, 497 U.S. 227 (1990). It is clear from these cases that the application of

the second *Teague* exception is receiving disparate treatment in the lower courts.

Significant questions requiring resolution by this Court are raised by this divergent authority as well. If the accuracy element is to be broadly applied, then the finality and comity interests advanced by the *Teague* doctrine will hinge entirely on the application of the watershed rules element. Given the split of lower court authority, one may legitimately question whether the second exception may be permitted to swallow the general rule of nonretroactivity under the *Teague* doctrine. The prior pronouncements of this Court as to the "narrowness" of both exceptions have not precluded lower courts from liberally applying the second exception. This appears to be a consequence of the absence of affirmative guiding principles from this Court on this issue. This case provides an opportunity for this Court to furnish guidance on these questions and to preserve the integrity of this important doctrine. Ultimately, the issue is how far the "latent danger," acknowledged during the inception of the *Teague* doctrine, will spread. *See Butler*, 494 U.S. at 416.

d. This Case Also Presents An Opportunity to Clarify the Relevance and Role of Finality and Comity to the Application of the *Teague* Exceptions

This Court has previously noted that "[t]he scope of the *Teague* exceptions must be consistent with the recognition" of the finality and comity interests at stake and the

costs of collateral review imposed upon the States. *Sawyer*, 497 U.S. at 242. In explicating the scope of the second *Teague* exception, this case also provides an opportunity to discuss the direct relevancy of these criminal justice interests to the application of the exceptions. For example, some lower court decisions merely consider whether the proposed new rule qualifies under the second exception without discussing the limited scope of collateral review and the finality and comity concerns at stake. *See, e.g., Dixon*, 961 F.2d at 454-56. Since these interests furnish the primary basis for the *Teague* doctrine, they should not be lost by the broad application of the *Teague* exceptions by lower federal courts. If the scope and the application of the *Teague* exceptions are to be consistent with the general principle against retroactivity, then it is appropriate that the impact on finality and comity interests be assessed as part of any application of the *Teague* exceptions.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari.

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